APPENDIX A — OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JULY 18, 2007

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 06-1373, 06-1374, 06-1488

UNITED STATES OF AMERICA,

Appellant, Cross-Appellee,

v.

DANIEL E. CARPENTER,

Defendant-Appellee, Cross-Appellant.

Before

Lynch, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

July 18, 2007

LIPEZ, *Circuit Judge*. In an appeal brought by the government, we must decide whether the district court erred when it granted Daniel Carpenter a new trial because the government's use of inflammatory language during its closing and rebuttal arguments prejudiced the jury and denied Carpenter a fair trial. In a cross-appeal, Carpenter asserts that the district court erred in failing

to grant his motion for judgment of acquittal. We affirm the new trial ruling. We conclude that we lack jurisdiction to hear Carpenter's cross-appeal.

I.

A. Factual Background

We briefly rehearse the relevant facts, which are largely undisputed. In October 1998, Daniel Carpenter and Martin Paley formed Benistar Property Exchange Trust Company, Inc. ("Benistar") for the purpose of performing property exchanges pursuant to section 1031 of the Internal Revenue Code, 26 U.S.C. § 1031. § 1031(a)(1) allows a seller of "property held for productive use in a trade or business or for investment" to avoid capital gains on the sales proceeds if they are used to purchase a replacement property meeting the same criteria. In order to qualify, the seller must complete the exchange within 180 days of the original sale and must not take control of the proceeds in the interim, § 1031(a)(3). Accordingly, property owners typically entrust their sales proceeds to a qualified intermediary until they purchase replacement property; Benistar was created to play this role.

Benistar's clients signed standard form agreements providing that property sale proceeds be transmitted by wire or check directly from the closing attorney into a Benistar account. Clients chose between a Merrill Lynch Ready Asset Money Market Account, yielding a 3% return on investment per annum (which allowed clients

to access their funds upon 48 hours' notice), and a Merrill Lynch Investment Account, yielding 6% interest (which required 30 days' notice before funds could be accessed).

According to the agreement between Paley and Carpenter, Paley marketed Benistar's services to clients while Carpenter maintained sole authority over the financial aspects of the business. Carpenter opened two accounts at Merrill Lynch in October 1998: the "B01 account," into which client funds were deposited; and the "B10 account," into which Carpenter transferred client funds which he then invested. When he opened the B10 account, Carpenter characterized his risk tolerance as "aggressive" and he informed Merrill Lynch that he intended to engage in options trading. As is their practice, Merrill Lynch counseled Carpenter on the riskiness of these investments and required him to sign a form acknowledging his understanding of those risks.

From October 1998 until late September 2000, Carpenter transferred funds from the B01 account to the B10 account and traded extensively in stock options. While his trading strategy was successful at first,[1] Carpenter lost significant sums when the stock market began to decline in March 2000. As the market continued to decline thereafter, his Merrill Lynch brokers repeatedly counseled Carpenter to adopt a more conservative trading strategy. After Carpenter sustained roughly $4 million in losses, Merrill Lynch suspended his trading privileges.

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1. Indeed, testimony indicated that, in the fourth quarter of 1999, Carpenter was "up" roughly $800,000.00, providing Carpenter with slightly more than $600,000.00 in profit.

Carpenter then moved his trading activity to PaineWebber, where he again opened linked accounts: client funds were deposited by mail or wire into one account and he engaged in stock option trading from the other account. As had Merrill Lynch, PaineWebber counseled Carpenter on the risks inherent in options trading; Carpenter acknowledged these risks and continued his aggressive investment strategy. Carpenter continued to sustain heavy trading losses at PaineWebber and, despite his broker's urging that he adopt a more conservative investment strategy, Carpenter increased the size and riskiness of his trades as his fortunes declined. PaineWebber discontinued Carpenter's trading privileges in December 2000. Although Benistar had been losing client funds since March 2000, incoming funds had covered the losses. However, by January 2001, Benistar was forced to tell its clients that their money was gone. Benistar subsequently ceased operations, having lost roughly $9 million in client funds.

B. Carpenter's Trial

Carpenter was indicted in February 2004 by a federal grand jury in the District of Massachusetts on fourteen counts of wire fraud, in violation of 18 U.S.C. § 1343, and five counts of mail fraud, in violation of 18 U.S.C. § 1341. In particular, Carpenter was charged with having devised and implemented a scheme to defraud investors by representing that their money would be invested prudently in conformity with the property exchange requirements of the Internal Revenue Code while he

intended to pursue an investment strategy at odds with such representations. Critically, clients transferred funds to Carpenter and Benistar by mail and wire in response to the investment scheme. Because both mail and wire fraud require an intent to defraud, the trial focused largely on Carpenter's state of mind when he obtained the funds of Benistar's clients through the representations made to them.

In his defense, Carpenter portrayed his lack of interaction with clients and his lack of knowledge about Benistar's promotional materials. He contended that any assurances made to clients about the risks to their funds were made by Paley alone and without his knowledge.[2] In addition, Carpenter emphasized that the client agreements placed no restrictions on how funds would be managed in order to produce the 3% or 6% return selected by the clients. Carpenter argued that he never misled clients into believing their funds would be safe. Rather, he insisted that he acted with the good faith belief that he had unfettered discretion to invest client funds. He attributed Benistar's losses not to an unwise trading strategy but to a generalized stock market crash well beyond his control.

The government focused on the incongruity between the nature of a § 1031 property exchange (a transaction

2. Paley provided extensive documentary evidence and deposition testimony to the government as it built its case. He also testified as a witness against Carpenter at trial. No criminal charges were brought against Paley in connection with this wire and mail fraud scheme.

structured to avoid capital gains while allowing investors to use the proceeds of one property sale to purchase a replacement property within a short period of time) and the aggressive nature of Carpenter's investment behavior. It contended that this incongruity demonstrated Carpenter's intent to mislead Benistar's clients into depositing their real estate proceeds with a supposedly safe intermediary so that he could leverage the funds into a substantial profit for himself through risky options trading. To prove this agenda, the prosecution sought to introduce extensive evidence regarding Carpenter's investment behavior, relying chiefly on testimony from his brokers at Merrill Lynch and PaineWebber.

Carpenter's counsel objected to such evidence before its introduction and throughout the trial, arguing that testimony regarding Carpenter's trading strategy and losses was both irrelevant to establishing his state of mind at the time he obtained client funds and also highly prejudicial. The court denied counsel's motions in limine and his repeated objections, ruling that the brokers could testify as to factual matters for the limited purpose of allowing the jury to "consider[ ] the historical fact of the kind of trading that was done so the jury can decide . . . whether [Carpenter] had the requisite criminal state of mind" when investors were assured that their funds would be kept safe. The court also determined that, because no foundation had been laid to treat them as experts, these witnesses could not provide opinion testimony. In addition, the court repeatedly expressed its concern that such evidence not be used to distract

the jurors from the elements of the charged offenses of mail and wire fraud. These witnesses's testimony dominated three of the ten days of Carpenter's trial.

During its closing and rebuttal arguments,[3] the government emphasized that the riskiness of Carpenter's trading strategy conflicted with the purposes for which Benistar's clients entrusted their money to Carpenter's management. In making this argument, the government embellished its description of Carpenter's trading strategy with gambling metaphors and terminology intended to show Carpenter's recklessness.

A jury convicted Carpenter on all counts. Shortly thereafter, Carpenter filed motions for a new trial under the Federal Rules of Criminal Procedure 33(b)(2) and for judgment of acquittal under Rule 29(c), each raising several grounds. The district court granted the motion for a new trial, ruling that the government's repeated use of gambling metaphors during its closing arguments "may [ ] have induced a verdict based on the jury's moral disapproval of the 'gambling' " rather than on the jury's conclusion that Carpenter had committed mail and wire fraud. *United States v. Carpenter,* 405 F.Supp.2d 85, 102 (D.Mass.2005). The court denied the motion for acquittal and subsequently denied Carpenter's motion for reconsideration. The government appealed the new trial

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3. The closing and rebuttal arguments will be referred to hereinafter as "the closing arguments."

ruling pursuant to 18 U.S.C. § 3731[4] and Carpenter filed a cross-appeal, arguing that the court wrongly decided his motion for acquittal.

II.

A. The Motion for a New Trial

The government contends that the district court abused its discretion in granting the motion for a new trial because: (1) it did not apply plain error review despite Carpenter's failure to object to the government's use of gambling metaphors until after the jury delivered its verdict; (2) the government's references to gambling were not improper under any standard; and (3) even if the gambling references were improper, they did not amount to a "miscarriage of justice," warranting a new trial. *England v. Reinauer Transp. Cos.*, 194 F.3d 265, 270 (1st Cir.1999) (citing *Conway v. Electro Switch Corp.*, 825 F.2d 593, 598-99 (1st Cir.1987)). We consider these arguments in turn.

1. Preservation of Carpenter's Objection

The government argues that because Carpenter did not contemporaneously object to the government's use of gambling metaphors during its closing arguments, the district court should have reviewed the motion for a new

4. We note that the government's ability to appeal the district court's grant of a motion for a new trial is a relatively recent phenomenon, arising from the 1984 amendments to § 3731.

trial based on those arguments for plain error.[5] Although the government pressed this same plain error argument before the district court, the court did not expressly address the argument in its opinion ordering a new trial. Nevertheless, as we shall explain, the court's opinion can only be read as an implicit determination that Carpenter preserved his objection to the closing arguments.

The government concedes that Carpenter moved in limine and made several trial objections to the introduction of testimony related to Carpenter's investment strategy and losses. However, the government argues that these objections were insufficiently specific, and that they addressed only the *admission* of evidence and not the manner in which the government could *argue from* that evidence during its closing and rebuttal.

Historically, when a party's motion in limine to exclude evidence had been denied, the party's failure to renew the objection at trial was considered "fatal." *E.g., United States v. Vest,* 842 F.2d 1319, 1325 (1st Cir.1988). However, Federal Rule of Evidence 103(a) was amended in 2000 to read, in pertinent part: "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." The accompanying commentary explains that "[w]hen the ruling is definitive, a renewed objection or offer of proof at the

5. The parties agree that the court did not apply plain error review.

time the evidence is to be offered is more a formalism than a necessity." Fed.R.Evid. 103 advisory committee's note, 2000 Amendment. In applying this rule, we must pay particular attention to the question whether the trial court made "definitive" rulings on the motion in limine. *Crowe v. Bolduc*, 334 F.3d 124, 133-34 (1st Cir.2003).

Carpenter repeatedly objected to the introduction of evidence regarding his trading strategy and losses, arguing that it was irrelevant and overly prejudicial because it distracted the jury's attention from whether he intended to defraud Benistar's clients at the time their funds were solicited, and focused their attention instead on the sagacity of his investment strategy. Indeed, before the trial even began, Carpenter moved in limine to preclude the testimony of the Merrill Lynch and PaineWebber brokers based on irrelevance and undue prejudice. He also argued that, because they had not been identified as expert witnesses, the brokers should not be allowed to give any evaluative opinions about his trading strategy.

The court found Carpenter's arguments somewhat persuasive, ruling on the motion in limine that the "jury may take account of what kind of trading was done in evaluating whether there was a culpable state of mind. . . . but evaluative opinions about the nature of the trading from people who have not been identified as [expert] witnesses will not be permitted." In addition, the court stated that "it would be appropriate to caution the jury in [its] instructions to stay on the elements of the offenses that are charged and not imagine other

wrongs." The court added: "[w]hen we've seen all the evidence, we'll have a clearer idea of what to do on that subject."

Despite the court's preliminary ruling on his objection to the brokers' testimony, Carpenter continued to object to that testimony to assure the preservation of his objection. For instance, at the end of the first day of broker testimony, Carpenter's counsel stated: "I just want to preserve my objection because I don't know if I preserved [it] adequately in terms of all the testimony that came in. . . . [I]t's the same issue, but I didn't want to stand up every time." The court responded: "I think your objection is preserved."

At the conclusion of the Merrill Lynch brokers' testimony, Carpenter filed a motion for mistrial, arguing that he had been "irretrievably prejudiced in front of the jury by the [testimony of the] Merrill Lynch witnesses that he was an aggressive speculator[,] river boat gambler." The court denied Carpenter's motion for a mistrial, explaining: "I adhere to the ruling that permitted the admission of the evidence in advance. I understand the point. We'll deal with it at some additional occasions." When Carpenter's counsel asked for a "running objection in line with the motion [for a mistrial]. . . . So I don't have to stand up," the court responded: "You're covered under Rule 103." The recognition of a continuing objection could not be clearer.

After Carpenter received that assurance, the government presented two expert witnesses who

testified regarding Carpenter's investment strategy. In a motion in limine seeking to preclude the testimony of the second expert, Marc Allaire, Carpenter argued: "the jury has already heard sufficient evidence regarding the rudiments of options investments. . . . Any further testimony by Allaire on this issue would simply be cumulative, unhelpful and a waste of time." Although the court rejected the motion in a ruling from the bench, it reiterated its concern for

> making sure that the jury at the appropriate time is focused on the elements of the offense and what needs to be proved. And I agree that to some degree this is all relevant as to state of mind, but I'm concerned that the more the wisdom of the trading strategy gets debated, the more the jury will think that has greater significance than maybe it does in their deliberations. . . . I want to keep this focused on whether there was an intent to deceive or specific intent to defraud.

Carpenter's counsel persisted, stating: "I'm not going to belabor the point, your Honor. . . . I would just preserve the issue." The court responded: "Okay. All right." After Allaire's testimony, the court heard a final day of testimony focused primarily on establishing the authenticity of the actual mail and wire transfers of funds from Benistar's clients into the Benistar account. The parties then presented their closing arguments the next day.

Thus, the trial court devoted considerable attention to the contested evidence throughout the trial, fielding repeated objections and stressing its concern that the government limit its use of the evidence to illuminating Carpenter's intent. Placed in this context, we find unpersuasive the government's attempt to distinguish between the introduction of the evidence covered by Carpenter's objections at trial and the prosecution's arguments from that evidence, to which Carpenter did not specifically object before jury deliberations. We look in vain for any indication that the government drew this distinction in its written submission to the district court in opposition to Carpenter's motion for a new trial. More importantly, even if this distinction was discernible in the government's opposition, the district court was entitled to reject it and conclude that Carpenter's continuing objections to the admission of evidence about his investment strategy and losses applied as well to the government's closing arguments based upon that evidence.[6] Hence we reject the government's argument

6. The dissent argues that we should not infer that the court ruled that defendant preserved his objection to the government's use of gambling metaphors in its closing arguments and that the plain error standard did not apply to the request for a new trial based on the closing arguments. However, the government explicitly argued for plain error review in its written opposition to Carpenter's motions for judgment of acquittal and a new trial. The court issued a lengthy published decision on these motions, addressing each of Carpenter's arguments in detail, including the argument that the court entitled in its decision "Prejudicial Inflammatory Argument" (a reference to the gambling metaphors). In explaining its decision to grant a new trial because of this inflammatory argument, the

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that the district court erred in failing to apply plain error review to the government's new trial motion.

The dissent disagrees with this conclusion, asserting that the district court had to apply the plain error standard to the defendant's motion for a new trial because Carpenter failed to preserve his objection to the government's use of gambling metaphors in its closing

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court explained its decision in harmless error terms: "Because it cannot be said with confidence that the government's improper closing arguments did not taint the verdict, the verdict cannot be allowed to stand." This language echoes other decisions on new trial motions that have evaluated whether the interest of justice requires a new trial under the harmless error standard. *See, e.g., United States v. Casas*, 425 F.3d 23, 38 (1st Cir.2005) (assessing whether trial error affected the trial's outcome); *United States v. Hodge-Balwing*, 952 F.2d 607, 610 (1st Cir.1991) (same); *United States v. Capone*, 683 F.2d 582, 585-86 (1st Cir.1982) (same). Given the thoroughness of the court's decision, including its explanation of the reasons for granting a new trial, we can only conclude that the court did not apply plain error review because it consciously rejected the government's plain error argument. Moreover, even if the district court had satisfied the dissent's insistence on an explicit ruling rejecting the plain error standard, the dissent would still deem that ruling a legal error. The dissent's central concern is not the adequacy of the court's explanation of its decision to apply the harmless error standard. Instead, the dissent argues that the district court could not apply the harmless error standard because, as a matter of law, the defendant did not preserve his objection to the government's use of gambling metaphors in its closing arguments. As we explain more fully, that argument misperceives the standard of review that an appellate court should apply to a trial court's preservation ruling.

arguments. This assertion reflects the dissent's unstated premise that appellate review of the trial court's preservation determination is de novo. That is not the law. Instead, the appellate court should defer to such a preservation ruling by the district court. The preservation requirement has two components: alerting a trial judge to a party's objection to a ruling or to the admission of evidence and adequately explaining the basis for that objection. *See Estate of Keatinge v. Biddle*, 316 F.3d 7, 15 (1st Cir.2002). Thus advised, the trial judge can decide what course of action to take to assure, so far as possible, the legal correctness of the trial proceedings. *Id.* Faced with post-trial arguments debating whether an objection to evidence or arguments was adequately preserved, it is certainly the trial judge who is in the best position to decide if she sufficiently understood that an objection had been made and the grounds for it. Given that reality, the appellate court should defer to the trial court's preservation ruling.[7] The dissent rejects such

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7. We routinely defer to the trial court when it is better positioned to assess the relevant factors for making particular kinds of decisions. *See, e.g., Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 735 (7th Cir.2004) (deferring to trial court's evaluation of party's motion practice); *United States v. Capelton*, 350 F.3d 231, 238 (1st Cir.2003) (applying abuse of discretion standard to trial court's ruling on a motion for mistrial); *Ferrara & DiMercurio v. St. Paul Mercury*, 240 F.3d 1, 13 (1st Cir.2001) (deferring to trial court's determination whether misconduct occurred and whether it required judicial sanction); *United States v. Dumas*, 207 F.3d 11, 16 (1st Cir.2000) (deferring to trial court's assessment of witness credibility); *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 20 (1st Cir.1997) (deferring to trial court's determination of evidence's relevance).

deference in favor of a de novo standard of review which fails to account for the trial court's superior position to determine whether it has been properly apprised of an objection.

In addition, contrary to the suggestion of the dissent, there is no rule that preserved objections to the admission of evidence cannot also cover closing arguments based upon that testimony. Here, in evaluating defendant's demand for a new trial on the basis of gambling metaphors in the government's closing arguments, the district court could reasonably conclude that the defendant's strenuous objections to the evidence on trading strategy and losses embraced the gambling metaphors that characterized that evidence in such provocative terms in the government's closing arguments.

The dissent cites unfairness to the government in the district court's new trial ruling. Specifically, the dissent speculates that "had there been a cognizable objection here, the government would likely not have to retry the case, and the considerable burdens of a retrial would not be placed upon witnesses and alleged victims." Once again the dissent refuses to acknowledge the superior position of the district court to determine, from its vantage, that the defendant had already registered a cognizable objection to the government's use of gambling metaphors through its repeated objections to the evidence underlying those metaphors.

However, there was always the risk for the government that the court, in the context of a post-trial motion for a new trial, would reconsider the appropriateness of its handling of the evidence and arguments on trading strategy and financial losses. That risk emphasizes why there is no unfairness to the government in the court's decision to award a new trial. As we have already noted, after one of its rulings admitting evidence on trading strategy and losses, the court stated that "it would be appropriate to caution the jury in [its] instructions to stay on the elements of the offenses that are charged and not imagine other wrongs." The court expressed similar concerns on other occasions about the potential for the unfairly prejudicial impact of this evidence on the jury. Yet, as we explain more fully in the next section of the opinion, the government ignored the court's concerns about the limited relevance of the trading strategy and financial losses evidence. Instead of engaging in a straightforward explanation of the relevance of that evidence to the defendant's criminal intent, the government used provocative gambling metaphors to characterize that evidence. This calculated decision by the government increased the risk that the court, in evaluating a post-trial motion for a new trial, would conclude that this provocative treatment of the potentially unfairly prejudicial evidence made this prejudice real and required a new trial in the interest of justice.

The government cannot claim surprise in such a ruling. When it resorted to the gambling metaphors in its closing arguments, the government made its own

gamble that the court, despite its uneasiness about the potential prejudicial impact of the evidence of trading strategy and financial losses on the jury, would not conclude, in evaluating the inevitable motion for a new trial, that the government had gone too far with its arguments. There is no unfairness to the government if it has now lost that gamble.

2. Propriety of Gambling Metaphors in Closing

We must now decide if the district court was correct in ruling that the government had gone too far with the many gambling references during its closing arguments. Although we employ the deferential abuse of discretion standard in reviewing the district court's ultimate determination that the prosecution's inflammatory statements warrant a new trial, we must review de novo the prior question of whether the comments themselves were improper. *United States v. Hernandez*, 218 F.3d 58, 68 (1st Cir.2000) (reviewing de novo whether prosecutor's statements during closing arguments were improper because they relied on evidence related to activities outside the scope of the alleged conspiracy to prove a criminal association); *United States v. Lewis*, 40 F.3d 1325, 1337-38 (1st Cir.1994) (applying de novo review to determine the propriety of prosecutor's comments during closing arguments that the defense had failed to produce evidence regarding an alleged "frame up"); *United States v. Glantz*, 810 F.2d 316, 320-21 & n. 2 (1st Cir.1987) (acknowledging that a de novo standard of review applies to the legal question of whether the prosecutor's arguments were proper, but determining

that the court need not decide propriety where it finds that the grant of a new trial on the basis of such arguments was an abuse of discretion even if the arguments were improper).

The district court acknowledged that the "gambling characterizations were not, as a matter of the narrative of the government's case, wholly inapt," 405 F.Supp.2d at 101. However, it found that the "repeated references to gambling were intended to, and did, inflame the jury's passions against the defendant," *id.* We agree.

In assessing whether the use of particular language is improper, we look beyond the technical accuracy of a phrase and consider such factors as the "threat of unfair prejudice, frequency of use, and alternative means of description." *United States v. Felton*, 417 F.3d 97, 103 (1st Cir.2005). The prosecution's use of gambling language was extensive. The district court counted eighteen instances in which the government used some permutation of the word "gamble," along with numerous references to other gambling terms. 405 F.Supp.2d at 101. The government referred to gambling in its morally freighted gaming sense, with provocative references to "cashing in chips," "doubling down" and "river boat gambler." In a particularly dramatic example, the prosecution intoned:

> Any reasonable person with or without investment experience and knowledge would have said it's time to cash in my chips and go home. Not Dan Carpenter. He kept on

> playing. . . . The self-professed river boat gambler pushes on until the losses mount and mount and mount.

Finally, we are most concerned that the government would use such provocative language in the face of the court's repeated caution that the evidence upon which the gambling terminology was based should not be used to distract the jury from its focus on Carpenter's state of mind when he obtained his clients' funds. We cannot ignore this important context in evaluating the choices the prosecution made when it crafted its closing arguments.

While we agree that "a criminal defendant is not entitled 'to a prosecutorial summing-up confined to platitudes and euphemisms,' " *United States v. Rodriguez-Estrada*, 877 F.2d 153, 159 (1st Cir.1989) (quoting *Palmariello v. Sup't of MCI Norfolk*, 873 F.2d 491, 494 (1st Cir.1989)), we must also ensure that "while a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones,' " *United States v. Taylor*, 54 F.3d 967, 977 (1st Cir.1995) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). Because the government repeatedly referred to gambling in a pejorative sense in its closing arguments, despite the district court's explicit warning against distracting the jurors from the elements of the crimes charged, we agree with the district court that the prosecutor's gambling arguments were improper.

3. Grant of a New Trial

Before granting a new trial based on a prosecutor's improper comments in a closing argument, a court must "determin[e] 'whether [those comments] ha[ve] so poisoned the well that a new trial is required,' " *United States v. Robinson*, 473 F.3d 387, 398 (1st Cir.2007). In so doing, the court considers such factors as: (1) the extent of the improper remarks, (2) the context, (3) the likely effect of any curative instructions given by the judge, and (4) the weight of the evidence against the defendant. *Id.* (citing *United States v. Casas*, 425 F.3d 23, 38 (1st Cir.2005)). However, these factors are not exhaustive; they are meant merely to guide the court's inquiry into whether the prosecutor's improper comments have undermined the fairness of the trial.

In assessing the extent to which the improper arguments affected the outcome of the trial, the district court focused on the frequency with which the gambling references were made, their "persistently pejorative" nature and their "tendency to lead the jury away from the charges in the indictment by inviting them to blame Carpenter because he was a gambler, or because he lost the exchangors' money, rather than because he had committed mail or wire fraud." 405 F.Supp.2d at 102.

The court also emphasized the context in which those comments were made, noting that it had admitted the evidence from which these gambling metaphors were drawn for a "limited purpose," and observing that "this evidence was introduced in the latter stages of the

government's case, close in time to the closing arguments. As the arguments were made, this evidence likely remained vivid in the jurors' memories." *Id.* Placed in this context, the court concluded: "Condemning Carpenter for 'gambling,' as the prosecutors persisted in doing, was an appeal to instincts of moral disapprobation about recklessness, waste, and perhaps even theft." *Id.*

After highlighting the improper nature of the government's arguments, the court related those arguments to the overall strength of the government's case:

> though sufficient to withstand a motion for judgment of acquittal, the case was not so strong that it can confidently be said that the repeated 'gambling' references had no illegitimate effect on the jury's assessment of the evidence. On what was perhaps the crucial issue, the jury would certainly have been warranted in concluding beyond a reasonable doubt that Carpenter acted with intent to defraud, but a contrary conclusion also would have been rationally possible on the evidence.

Id. at 103. The court concluded: "Because it cannot be said with confidence that the government's improper closing arguments did not taint the verdict, the verdict cannot be allowed to stand." *Id.*

We afford the district court substantial deference in such an assessment, reflecting the trial judge's familiarity with the case. The "trial judge 'has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.' " *Glantz*, 810 F.2d at 320 n. 2 (quoting *Arizona v. Washington*, 434 U.S. 497, 514, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). We find no basis for concluding that the district court abused its discretion in ordering a new trial.[8]

B. The Motion for Judgment of Acquittal

In his cross-appeal, Carpenter contends that the district court erred in denying his motion for judgment of acquittal because the government failed to present sufficient evidence on the mail and wire fraud charges to permit a reasonable jury to convict him. Before we may reach the merits of Carpenter's cross-appeal, we face the threshold question of our jurisdiction. Carpenter urges us to assert jurisdiction over his cross-appeal under the so-called "collateral order" doctrine, in order to protect his right to be free from double jeopardy and as a matter of judicial economy.

Although 28 U.S.C. § 1291 specifies that our jurisdiction extends only to appeals from "final decisions

8. Our agreement with the district court's grant of a new trial because of gambling metaphors obviates any need to address the alternative bases Carpenter asserted in his motion for a new trial.

of the district courts," the Supreme Court, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), identified a "small class . . . [of] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The Court has since held that "a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds . . . fall[s] within [this] 'small class of cases.' " *Abney v. United States*, 431 U.S. 651, 659, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). There, the Court relied upon the finality of the district court's action—there being "no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee," *id.*—and the fact that the "elements of [his double jeopardy] claim are completely independent of his guilt or innocence," *id.* at 660, 97 S.Ct. 2034. The court also emphasized that "even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* at 662, 97 S.Ct. 2034.

Carpenter argues that the refusal to consider his cross-appeal would force him "to endure the personal strain, public embarrassment, and expense of a [second] criminal trial," which *Abney* sought to avoid. *Id.* at 661, 97 S.Ct. 2034. With this language, Carpenter invokes the

principle of double jeopardy. *See Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."). In addition, he claims that our refusal to hear a sufficiency claim in these circumstances would burden defendants with a "Hobson's choice" between: (1) waiving the right to move for a new trial in order to ensure appellate review of a sufficiency claim; and (2) moving for a new trial and losing the right to appeal a sufficiency claim arising from the first trial. Carpenter further argues that considerations of judicial economy support our review because we must review the trial record in any event to assess the government's appeal of the new trial ruling.

While Carpenter's assertions have practical appeal, they run afoul of most of the relevant precedent. As we have recognized elsewhere, *Abney* "is not carte blanche authority for all interlocutory appeals brought under the Double Jeopardy banner, since some such claims do not meet the requirements of the 'collateral order' doctrine." *United States v. Ramirez-Burgos*, 44 F.3d 17, 18 (1st Cir.1995). In order to qualify for review under the collateral order doctrine, the collateral issue must:

> (1) [be] so conceptually distinct from other issues being litigated in the underlying action

> that an immediate appeal would neither disrupt the main action, nor threaten to deprive the appellate court of useful context which might be derived from subsequent developments in the litigation; (2) completely and conclusively resolve the collateral issue; (3) infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case; *and* (4) involve an important or unsettled legal issue, rather than merely challenge discretionary trial court rulings.

United States v. Kouri-Perez, 187 F.3d 1, 5 (1st Cir.1999). We have emphasized that "all four of [these] criteria must be met for there to be jurisdiction under this exception to § 1291 finality." *In re Licht & Semonoff*, 796 F.2d 564, 571 (1st Cir.1986).

In *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), the Supreme Court reasoned that "the protection of the Double Jeopardy Clause . . . applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." Guided by this principle, the Court went on to determine that a mistrial was not a jeopardy-terminating event and thus a second trial was not barred even if there had been insufficient evidence to convict at the first trial. *Id.* at 326, 104 S.Ct. 3081.

We extended this logic to the vacatur of a conviction on appeal for legal error in *United States v. Porter*, 807

F.2d 21, 24 n. 2 (1st Cir.1986), stating: "where the first conviction was vacated for legal error, not insufficiency of evidence, the concept of continuing jeopardy rules out a double jeopardy claim based on purported insufficiency of evidence at the first trial." Thus, a defendant who succeeds on appeal in demonstrating that he is entitled to a new trial because of error at his first trial may not assert a double jeopardy bar to retrial. As his original jeopardy has not yet ended, there is no double jeopardy to avoid.

It is a short step from *Porter* to the case before us, where the trial court itself ordered a new trial on the basis of legal error. *Porter* teaches that a defendant has no double jeopardy claim when his conviction has been vacated for legal error. *Id.* at 24. That is what occurred here. Although Carpenter's conviction was undone by the trial court rather than on appeal, this is a distinction without a difference.

Without a viable double jeopardy claim, Carpenter has no double jeopardy "right" that he cannot effectively vindicate if he is not permitted to challenge the sufficiency of the evidence in this appeal. Hence he cannot meet the third criterion of the collateral order doctrine.[9] The Second and Seventh Circuits have

9. It is important to understand that Carpenter, in pursuing his cross-appeal, has invoked the principle of double jeopardy in the service of his primary argument that we should review the sufficiency of the evidence argument he makes in his cross-appeal. That is, Carpenter did not file a motion in the trial court

(Cont'd)

similarly found no jurisdiction to hear cross-appeals of a denial of a motion for judgment of acquittal under the collateral order doctrine where the district court's order of a new trial vacated the underlying conviction. *United States v. Eberhart*, 388 F.3d 1043, 1051 (7th Cir.2004), rev'd on other grounds, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005); *United States v. Ferguson*, 246 F.3d 129, 138 (2d Cir.2001).

Carpenter claims support for his cross-appeal in three decisions from other circuits: *United States v. Greene*, 834 F.2d 86 (4th Cir.1987); *United States v. Wood*, 958 F.2d 963 (10th Cir.1992); and *United States v. Gotti*, 451 F.3d 133 (2d Cir.2006). Only *Greene* supports his position, and we decline to follow it.

(Cont'd)

arguing that his retrial was barred by the principle of double jeopardy. Indeed, there was no basis for any such argument. Hence, we are not reviewing a double jeopardy ruling by the trial court, or a claim that such a double jeopardy ruling itself falls within the collateral order doctrine. Instead, Carpenter uses double jeopardy principles to address the third element of the collateral order doctrine—namely, that the failure to address the collateral issue on appeal (here, sufficiency of the evidence) will infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case. Carpenter argues that, if the trial judge ruled incorrectly on his motion for judgment of acquittal, and if we failed to assess that possibility by hearing his cross-appeal, his retrial would infringe his double jeopardy right. However, as we have now shown, Carpenter misconstrues the nature of his double jeopardy right, and hence he cannot meet the third criterion of the collateral order doctrine.

In *Greene*, after the trial court ordered a new trial and denied Greene's motion for acquittal, the government appealed the new trial grant. Greene cross-appealed, arguing that the district court erred when it rejected his claim that the evidence was not sufficient to convict him and that to require another trial would violate his right not to be placed in jeopardy twice for the same offense. *Greene*, 834 F.2d at 87. While acknowledging that the "denial of a motion for judgment of acquittal prior to entry of a judgment or sentence [is] normally not reviewable in the Court of Appeals," the court determined that it "would be unfair to apply such a rule in the present proceedings." *Id.* at 89.

Neither *Wood* nor *Gotti* reaches such a result. In *Wood*, the trial court ordered a new trial and denied Wood's motion for judgment of acquittal. The government appealed the grant of a new trial, and Wood cross-appealed the denial of his motion for acquittal contending that double jeopardy barred his retrial. *Wood*, 958 F.2d at 965. Wood's double jeopardy claim was also based on the insufficiency of the evidence at his trial. *Id.* at 967. On the government's motion to dismiss the cross-appeal for lack of jurisdiction, the Tenth Circuit denied the motion and asserted jurisdiction over Wood's cross-appeal because it found a "colorable double jeopardy claim" giving rise to jurisdiction under the collateral order doctrine, *United States v. Wood*, 950 F.2d 638, 643 (10th Cir.1991). However, in its subsequent ruling, it affirmed the new trial grant and ultimately ruled that the double jeopardy claim lacked merit for many of the same reasons that we cite here, given that

the district court had granted defendant's motion for a new trial, *Wood* 958 F.2d at 970-71.[10] Notably, the court further concluded that its "resolution of the merits of Defendant's claims makes future double jeopardy claims like Defendant's non-colorable and, therefore, subject to summary dismissal when asserted on an interlocutory appeal." *Id.* at 972 n. 12.

In *Gotti*, there was no motion for judgment of acquittal based on insufficiency of the evidence in his first trial. Indeed, the jury had not convicted Gotti on any of the charges against him. *Gotti*, 451 F.3d at 135. Instead, it acquitted him on one charge and divided on others, resulting in the declaration of a mistrial on those charges. *Id.* The district court then denied Gotti's post-trial motion to bar a retrial on two of the counts on double jeopardy grounds. *Id.* at 135-36. Gotti then sought interlocutory review of that double jeopardy ruling itself. *Id.* at 136. There was no appeal by the government of any trial court ruling and no cross-appeal by Gotti trying to challenge a trial court ruling on a motion for judgment of acquittal. Citing *Abney*, the Court of Appeals analogized the trial court's double jeopardy ruling to a court's denial of a pretrial motion to dismiss counts of an indictment on double jeopardy grounds and concluded that this ruling met the requirements of the collateral order doctrine. *Id.* In addressing the merits of Gotti's

10. For example, the court emphasized that Wood could not be at risk of double jeopardy where his original jeopardy had not yet ended. 958 F.2d 963 at 970 (explaining that "[a] guilty verdict by a jury which is set aside by the district court on a motion by the defendant does not terminate jeopardy.").

double jeopardy argument, it rejected that argument on very different grounds than those Carpenter raises in asking us to hear his cross-appeal.[11] *Id.* at 136-37. Moreover, as noted, the "merits" issue on appeal in *Gotti* was the trial court's double jeopardy ruling itself. Here the "merits" issue in the cross-appeal is the trial court's ruling on the sufficiency of the evidence. *Gotti* has scant relevance to our application of the collateral order doctrine to that sufficiency ruling.

To the extent that Carpenter makes a judicial efficiency argument that is independent of the collateral order doctrine, we reject that argument as well. Carpenter's primary efficiency argument—that granting appellate jurisdiction over the cross-appeal makes "practical sense" because "given the government's appeal, the Court will now conduct a thorough review of the trial record in this case"—is beside the point. We are not at liberty to go beyond the established criteria of the collateral order doctrine to create new exceptions to the finality requirements of § 1291. Indeed, Carpenter's argument that we should consider his sufficiency claim as we consider the government's appeal

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11. Gotti argued that because the jury could not unanimously agree that the government had proved two predicate racketeering acts with which he was charged, he was entitled to acquittal on the RICO charges against him and could not be retried on any of the charges. The court rejected Gotti's "extraordinary argument," noting that "[o]n this reasoning, juror disagreement as to the proof of a predicate act could *never* result in a hung jury," and that "[t]he government is permitted to retry a defendant following a mistrial resulting from a hung jury." 451 F.3d at 136-37.

runs directly counter to the first criterion of the collateral order doctrine, which requires that the collateral issue (here, sufficiency) be "conceptually distinct" from the issues in the underlying action. *Kouri-Perez*, 187 F.3d at 5. Of course, Carpenter's sufficiency arguments are deeply entwined with the merits of the mail and wire fraud charges that constitute the underlying action.

In addition, even if we could recognize such an efficiency exception, any efficiency gains promised by Carpenter are illusory because there is little comparability between the review that we have had to conduct in our deferential review of the new trial grant and the de novo review we would have to conduct to evaluate the sufficiency of the evidence. In his sufficiency challenge, Carpenter raises arguments of causation, intent, constructive amendment of the indictment, reliance upon a theory of liability based on omission, good faith as an absolute defense, and venue. We have not had to address any of those issues in order to evaluate the district court's new trial ruling.

Carpenter raises a second argument under the banner of efficiency. If we deny appellate jurisdiction over his cross-appeal, he says, and reverse the district court's grant of a new trial, we will have to conduct a second review of the trial record at a later point in time after Carpenter is sentenced and files a direct appeal. Thus, Carpenter contends, granting jurisdiction to hear the cross-appeal at this point will "conserve judicial resources." However, the subsequent direct review of

the issues now raised in the cross-appeal would not represent a "second review" of the trial record because, as we have already noted, our review of the new trial ruling has not required us to review the portions of the record relevant to the issues raised in the cross-appeal. More importantly, Carpenter's second efficiency argument betrays his frontal challenge to the most basic precepts of the final judgment rule. If we were to reverse the trial court's new trial ruling, there would be no final judgment until Carpenter had been sentenced after a remand. *See Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."); *United States v. Leichter*, 160 F.3d 33, 35 (1st Cir.1998). We are not at liberty to disregard such well-established final judgment rules in pursuit of a false efficiency.

III.

For the reasons described above, we *affirm* the district court's grant of a new trial. We *dismiss* the cross-appeal for lack of jurisdiction.

So Ordered.

LYNCH, *Circuit Judge*, concurring. A trial judge may grant a new trial only "if the interest of justice so requires." Fed.R.Crim.P. 33(a). The power is used sparingly. But it may be triggered by a myriad of circumstances. Rule 33 wisely does not attempt to characterize those circumstances so as to limit a trial judge's authority to rule on a timely motion for a new trial.

Here, the trial judge concluded that the jury may well have been diverted from its task of determining whether the government had proven beyond a reasonable doubt each of the elements of the charged offenses. *United States v. Carpenter*, 405 F.Supp.2d 85, 102 (D.Mass.2005). The judge found that the government's case was not so strong that it could confidently be said that the repeated gambling references had no illegitimate effect on the verdict. *Id.* at 103. The court held that because it was possible that the government's closing arguments tainted the jury's verdict, the verdict could not be allowed to stand. In that context, the district court called the government's closing arguments "improper." *Id.*

The trial judge implicitly ruled that defendant had sufficiently preserved his objection to the gambling metaphor so that he was not required to take the unusual step of interrupting the government's closing argument. An appellate court is not entitled to second guess that conclusion, which was certainly not an abuse of discretion. The trial judge recognized that there was a point at which the relevance of the large losses produced

by risky trading was outweighed by the danger of distracting the jury from focused consideration of the actual charges. That grey zone was never well defined throughout the trial, and its demarcation points were not clarified before the closing arguments, despite the granting of a continuing objection. Perhaps both sides should have sought clarification before the closing arguments.

In my view, the real issue is not whether one side acted "improperly." It is the potential effect of this situation on the jury which matters. The experienced trial judge, who sat through the trial and the closing, concluded that the balance had tipped too far within that grey zone and that the interest of justice required a new trial.

Given that the trial judge lacked confidence that the verdict was based on proper considerations, and given the context in which the trial judge ruled, an appellate judge cannot say that the trial judge's conclusion was unreasonable. Indeed, the decision to grant a new trial does not even approach being an abuse of discretion.

CAMPBELL, Senior Circuit Judge, dissenting. This appeal centers around two issues: (1) whether in ruling upon defendant's motion for a new trial, the district court had to apply the plain error standard in Fed.R.Crim.P. 52(b)—a question turning on whether defendant failed to lodge a timely objection within Fed.R.Crim.P. 51(b)[12] sufficient to preserve the error for which the new trial was granted, namely, the government's use of gambling metaphors in its closing, which the court felt may have induced a verdict based on the jury's moral disapproval of gambling; and (2) whether the U.S. Attorney's gambling rhetoric went so far as to exceed fair comment and, in the event plain error review was required, to meet that standard.

In answer to (1), I believe the district court was required to apply the plain error standard in ruling on the new trial motion. As for issue (2), it would be premature for us to pass judgment on whether the gambling rhetoric could be found to amount to plain error, that question being one for the district court in the first instance. I would vacate and remand while

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12. Fed.R.Crim.P. 51(b) provides,

> A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

retaining jurisdiction so as to be able to decide in the future—should plain error be found below—whether that finding exceeds the district court's considerable discretion in the matter.

1. Adequacy of Objection

Judicial review is limited to "the notably ungenerous plain error standard" whenever "a defendant defaults on [the] obligation [to protect his own interests] by failing to make a contemporaneous objection to questionable comments in the prosecution's closing argument." *United States v. Taylor,* 54 F.3d 967, 977 (1st Cir.1995). Nothing in the language of Fed.R.Crim.P. 51 and 52, or in binding precedent, suggests that some different rule applies where a district court, as here, (rather than a court of appeals) is asked, post-verdict, to grant a new trial based on an alleged inappropriate closing.

One of the principal purposes of the contemporaneous objection requirement is to alert the district judge so that she or he can take on-the-spot curative steps, by instructing the jury to disregard the prejudicial rhetoric or in some other way minimizing the harm, thus obviating the trouble and expense of a new trial. As this court stated in *Taylor,* 54 F.3d at 972,

> [C]alling a looming error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. Then, too, the raise-or-waive rule ... precludes a party from making a tactical

> decision to refrain from objecting, and subsequently, should the case turn sour, assigning error. . . .[13]

Here, there is simply no indication that the gambling metaphors used by the government in its closing, and the purported moral disapproval they might engender in jurors, were concerns ever contemporaneously called to the district court's attention, either during the closing when those references were actually being made or, right after, before the case went to the jury, when the district judge could still have taken steps to cure whatever prejudice the rhetorical metaphors may have caused in the minds of the jurors. The basis for the grant of a new trial was not the brokers' testimony, to admission of which earlier, unsuccessful, objections were lodged and on which earlier objections the majority now relies in its opinion, but the colorful gambling metaphors employed by the government in closing argument which were later said by the district court to have carried the risk of inflaming the jurors' moral disapproval.

Had defendant contemporaneously objected to this allegedly inflammatory rhetoric either during or after

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13. In a later civil case, this court has said,

> We have made it transparently clear that the raise-or-waive rule can neither be ignored nor brushed aside as a "pettifogging technicality or a trap for the indolent." *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir.1995). Rather, it is a prudential rule "founded upon important considerations of fairness, judicial economy, and practical wisdom." *Id.*

Muniz v. Rovira, 373 F.3d 1, 4 (2004).

the closing, before the case went to the jury, the court could have instructed the jury to disregard it and explained to the jurors why the analogies were prejudicial and overblown, thus obviating the extreme and costly remedy of a new trial. Even had the defense attorney hesitated to interrupt the government's argument, there was ample time afterwards to have lodged an objection and for the court to have taken corrective steps. Indeed, following the court's closing jury instructions, when counsel were invited to submit their objections to the charge, defense counsel took that opportunity to protest certain parts of the government's closing but never mentioned these supposedly outrageous misstatements. Nor did the judge say anything to counsel or the jury about them during or after the closing, as one might have expected had the earlier evidentiary objections relied on by my colleagues actually functioned so as to call to the judge's mind that the defense was now objecting to the closing's gambling rhetoric[14]—or even that the rhetoric violated the court's

14. Judge Lipez states that the court's earlier response, "You're covered under Rule 103," to Carpenter's request for a running objection to admission of the Merrill Lynch brokers' testimony (described by defense counsel as portraying Carpenter as "an aggressive speculator[,] river boat gambler") was a clear recognition by the court of a continuing objection that served later as an adequate objection under Rule 51(b) to the government's repeated rhetorical use, in its closing, of the gambling analogies. But Rule 103 of the Federal Rules of Evidence is an evidentiary rule. *See* Rule 51(b) ("A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103"). Appropriately, the objections in question all related to the court's

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own earlier cautionary admonition against overemphasizing certain matters. The court's silence on the subject at the crucial moments strongly suggests that whatever the earlier objections accomplished, they did not accomplish what Rule 51(b) seeks—namely to alert the court contemporaneously, when corrective action by the court still remains possible, that the defense is then and there objecting to certain language being used in the government's oratory.

The purpose of Rule 51(b), in other words, is to put the court on *actual*, not just constructive, notice that a party protests a particular alleged defect—here, the closing gambling rhetoric—so that, inter alia, appropriate corrective action can be taken immediately if warranted. Rule 51(b) is not well served by resting the finding of an adequate objection upon an elaborate chain of appellate inferences going back to non-contemporaneous objections made earlier for a different purpose. Rule 51(b) requires, and ordinarily receives, a practical interpretation, consistent with its purpose to alert the court in a meaningful way so that it can act before too late.

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admission in evidence of the brokers' testimony, which emphasized the risky nature of option trading but did not invoke repetitive gambling metaphors nor raise the question of whether analogizing defendant's conduct to gambling would captivate the disapproval of jurors based on their moral disapproval of gambling. A new trial was not granted because the court decided it had erred in admitting the brokers' testimony but because of the inflammatory nature of the gambling figure used in the closing, with its peculiar tendency to invoke moral disapprobation.

Appendix A

It is overwhelmingly evident from the record that no one, prior to the verdict, got the message, including the judge, that the defense was protesting the government's rhetorical gambling analogies—analogies which the district court later said may have elicited the jurors' moral disapproval based upon their distaste for gambling. Without having been contemporaneously alerted by a Rule 51(b) objection, the district court was obliged, when it ruled on defendant's post-verdict motion for a new trial, to employ plain error review under Rule 52(b). The government made this point when arguing the motion,[15] but the district court did not address it at all. As my colleagues agree, it now seems the court, in granting a new trial, used the ordinary review standard (although Carpenter argues otherwise in his appellate brief).

My colleagues contend we should leave it to the district court, in these circumstances, whether a sufficient objection was lodged to preserve the closing gambling metaphor issue. Here, the judge, in passing on the defendants' new trial motion, made no express finding that an objection had been made, nor did he rule

15. Judge Lipez, in the majority opinion, speaks of "looking in vain" for any indication that the government ever argued that objection to the closing's gambling metaphors had not been preserved. In fact, the government noted (under the heading that its "closing and rebuttal fell within the bounds of proper argument") that most of Carpenter's points had not been preserved, and listed the few that had been, making clear its belief that the defense's objection to the use of gambling metaphors was one that had not been preserved and was subject to plain error review.

at all on the government's contention that an objection had not been preserved by the defense on the use of the gambling metaphors during the closing. But my colleagues would infer from the district court's complete silence that it must have found a sufficient defense objection, and they say they must defer to the district court on that and all related matters.

My difficulty with the above is that it treats the raise-or-waive rule as if it were only of concern to the district court—to protect it, for instance, against being "sandbagged" in the common situation where a defendant appeals to this court from an adverse ruling of the trial judge concerning some matter never called to the court's attention below. My colleagues' viewpoint would hold that where the district judge is satisfied—as presumably he was here—with whatever steps defendant took, *or did not take,* to preserve an objection, that should end the matter.

But I believe such deference is extreme. The raise-or-waive rule, it is true, exists to protect the trial judge, but it also serves other important goals. As already discussed, it serves the purpose of judicial economy, forcing all concerned, including the court itself, to face issues—such as the challenged rhetoric used by the government here—at a time when corrective action can still be taken short of a costly new trial. The opportunity for correction afforded by a timely objection, as well as the penalty of plain error review for failure to object, also promote essential fairness to the other party, here the government—and not only to the government alone,

but to those who must bear the burdens of a new trial, such as the victims of defendant's alleged misconduct and other witnesses. Had there been a meaningful, contemporaneous objection here, the government would likely not have to retry the case, saving both monetary costs and the added burdens on many others.

This is not to question the district court's discretion, were there merely a question of disputed evidence over the making of a sufficient contemporaneous objection, to resolve that dispute. But, here, the only arguably pertinent objections in the record—those made earlier under Fed.R.Evid. 103 to the admission of certain testimony—fell flagrantly short of meeting the requirements of Fed.R.Crim.P. 51(b) for valid objections to the closing's gambling rhetoric. And the record contains nothing except silence to suggest that the district court, when granting a new trial, ever determined that an adequate objection—or any objection—had been made. Rules 51 and 52 are binding procedural rules to which courts must adhere. The wide discretion very properly given to the trial judge does not include the discretion to ignore or simply bypass the raise-or-waive rule.[16]

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16. Of course, one might imagine special circumstances where a defense objection might not be needed to preserve an issue. For instance, the judge might, when the offending conduct occurs, give voice, sua sponte, on the record, to his own objection, which might in some circumstances relieve the defense of the need to object separately. But it seems unwarranted to presume such a special exception here, given the judge's complete silence

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I would add that even the plain error standard of Rule 52(b) still allows a court, in appropriate circumstances, when faced with a strong sense that an injustice has or may have occurred, to allow a new trial even though a timely objection was not lodged—and our review of such a decision would and should take into account the trial judge's firsthand "feel" for a case tried in his presence. Nevertheless, plain error review remains a considerably tougher, higher, standard than ordinary review. Given defendant's default, the government was entitled to the reassurance that the latter standard was being applied in this case, since the question of whether or not the gambling rhetoric used went too far, and its likely unfair impact on jurors, is a close one as to which the standard of review used could well have a decisive effect on whether or not to grant a new trial.

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at and after the closing, especially as, when the gambling rhetoric was later called to the judge's attention, he granted the extraordinary relief of a new trial. Surely, one would suppose, if the judge had at all considered the questionable character of the rhetoric at the time it was delivered, or then had believed the defense had objected to it at some earlier time, he would not have remained silent in the face of such knowledge, allowing events to proceed and the jury to remain uninstructed as to the improprieties that had occurred. To infer on this record and in the face of judicial silence, the preserving of a sufficient objection, seems to me tantamount to saying that Rule 51(b) and its companion, 52(b), need not be observed by the trial judge unless he or she cares to do so.

2. Whether Gambling Rhetoric Was Excessive

As said, I believe that this appeal should be remanded to the district court with instructions to reconsider its new trial ruling under the correct plain error standard. A ruling by us at this juncture would be premature, since the district court's judgment based on its first-hand knowledge and feel is an essential prelude to whatever action this court takes. We would necessarily grant considerable deference to whatever view the district court takes on whether what occurred at the trial met the high standard of plain error. This does not mean there are no limits to our deference, nor that appellate review will thereafter be forbidden. A district court would not have carte blanche discretion to order a new trial simply because, to take a purely hypothetical example, it deemed the U.S. Attorney's closing remarks to be too eloquent and defense counsel's closing much less so-even if the trial court believed the difference had been decisive to the case's outcome. There are, moreover, some arguments an attorney may make which will be so entirely relevant as to be privileged as a matter of law, just as there are others which the district court may determine dispositively as going too far.

Here, the government argues that its gambling analogy was so apt that it fell within the safety zone and that, in any event, the analogy was not so extreme as to amount to plain error. This is not an easy issue, and it is one as to which the district court's ruling, along with its reasons, one way or another, will not only be helpful but essential. I would, therefore, remand for a new ruling

on the new trial motion, one explicitly based on the plain error standard, which, in these circumstances, the district court was, in my view, legally obliged by the Federal Rules of Criminal Procedure to apply. It is most unlikely the district court believed it was applying that standard when it ruled previously, and, given especially the closeness of the grounds for granting a new trial, I believe the government is entitled to a ruling expressly based upon the correct legal standard. Given the high hurdle of plain error review, a remand is no mere waste of judicial time. To the contrary, it could be critical to the outcome, and it is also a necessary act of fairness to the government and those persons and interests the government serves, given the defendant's failure to have preserved a proper objection.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED DECEMBER 15, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 04-10029-GAO

UNITED STATES OF AMERICA

vs.

DANIEL E. CARPENTER

MEMORANDUM AND ORDER
December 15, 2005

O'TOOLE, District Judge.

Daniel E. Carpenter was tried on an indictment charging him with fourteen counts of wire fraud in violation of 18 U.S.C. § 1343 and five counts of mail fraud in violation of 18 U.S.C. § 1341. The jury returned a verdict finding Carpenter guilty under all counts.

Following the trial, Carpenter timely filed a renewed motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c) and an alternative motion for a new trial pursuant to Fed. R Crim. P. 33. This memorandum and order addresses both motions.

Appendix B

I. *The Motion for Judgment of Acquittal*

Carpenter's original motion for entry of a judgment of acquittal asserted three reasons why he was entitled to that relief: (1) the government had failed to disprove his good faith; (2) the proof at trial amounted to a variance from or a constructive amendment of the indictment; and (3) the evidence was insufficient as a matter of law to sustain the guilty verdicts. In his reply brief to the government's opposition, he refined the last ground by arguing specifically that the evidence was insufficient to prove that he had "caused" the mailings or wire transmissions alleged in the indictment. He also asserted in the reply that a judgment of acquittal is required because the evidence at trial did not support venue for the trial of the indictment in this District.

A. *Venue*

Carpenter has persistently maintained an objection to venue in this District. In his Rule 29 motion, he repeats his previous substantive objection and adds a procedural one: the question should have been put to the jury.

As to the procedural point, there is no controlling law in this Circuit. Carpenter points to decisions in other Circuits where various statements have been made about the necessity or propriety of submitting factual disputes about venue to the trial jury. It has been said, for example, that venue is a question of fact which ordinarily must be submitted to the jury. *See United States v. Miller*, 111 F.3d 747, 749 (10th Cir.1997).

That statement, however, incorporates two distinct propositions: (1) that the determination of venue depends on the resolution of disputed facts, and (2) that resolution must be done by a jury, not a judge. The first proposition, as stated, is undoubtedly overbroad, because not all venue determinations involve factual disputes; many require only a conclusion as to whether venue is proper, the facts being undisputed. *See, e.g., United States v. Palma-Ruedas*, 121 F.3d 841, 848 (3d Cir.1997); *United States v. Baxter*, 884 F.2d 734, 736 (3d Cir.1989); *see also United States v. Perez*, 280 F.3d 318, 322 (3d Cir.2002) ("In Baxter and Palma-Ruedas, we could rule as a matter of law because the necessary facts were established and only the legal question of how broadly we would define venue remained."). But more importantly for the present controversy, it is by no means clear that the second proposition must necessarily follow from the first, even where the underlying facts on which venue will be determined are vigorously disputed by the parties. In other words, characterization of an issue as involving the determination of facts does not automatically mean it is a matter to be decided by a jury. Some factual disputes, such as disputes about the predicate for the admission of evidence, for example, are typically (with some exceptions) resolved by the judge. *See* Fed.R.Evid. 104(a). *But see, id.* 104(b). *See also Blake v. Pellegrino*, 329 F.3d 43, 47-48 (1st Cir.2003) (judge resolves "foundational facts"). Moreover, as a practical matter, the judicial resolution of a factual dispute raised by a pretrial motion to dismiss or to suppress evidence often serves as the crucial turning point on the road to either conviction or acquittal.

If identifying a factual dispute about venue does not by itself compel the conclusion that the issue must be presented to a jury, what else might? Is the question required to go to a jury because proper venue is ultimately a constitutional right? *See* U.S. Const. art. III, § 2, cl. 3; *id.*, amend. VI. Not necessarily. Fact disputes arising with respect to other fundamental constitutional rights—such as whether there has been an unreasonable search or seizure or whether the assistance of counsel has been effectively provided—are routinely resolved by judges, not juries. The constitutional character of the right therefore does not determine whether the decision-maker should be a judge or a jury.

Some cases from other Circuits suggest that venue is effectively an "element" of the offense and then apply the rule that the jury must resolve all factual disputes concerning elements of the offense. *See United States v. Record*, 873 F.2d 1363, 1366 (10th Cir.1989) ("Venue in criminal cases is an element of the prosecution's case. . . ."); *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir.1984) ("Venue is an element of any offense."). In this Circuit, however, it has been plainly held that venue is *not* to be regarded as an element of the offense. *See United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir.1993) (citing *United States v. Hall*, 691 F.2d 48, 50 (1st Cir.1982)). Even without this circuit precedent, the idea that venue is an element of an offense is not compelling. There is no question that the burden rests with the prosecution to establish that venue for the trial is proper, and in this regard it may be correct to call

proof of proper venue an element of the prosecution's *case. See, e.g., Miller*, 111 F.3d at 749-50 ("Venue in federal criminal cases is an element of the prosecution's case. . . .") (quoting *Record*, 873 F.2d at 1366). Strictly speaking, however, venue is not regarded, even in other circuits, as an element of the *crime.*

Cases that refer to venue as an "element" of the offense seem to recognize that it is actually more like an isotope; it is not exactly like the other real, or "substantive," elements. *See United States v. Perez*, 280 F.3d at 330 ("[T]he term 'element' lacks its usual force in the context of venue. . . . When courts describe venue as an element, they often distinguish it from 'substantive' or 'essential' elements.") (citing cases); *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir.1981) ("Venue is, of course, unlike the substantive facts which bear on guilt or innocence in the case. Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused."). Unlike the rights to trial by jury, assistance of counsel, or confrontation of accusers, for example, the right to a trial in the proper venue can be waived—or more precisely, forfeited[1]—by the mere omission to claim it. *See Miller*, 111 F.3d at 750; *Winship*, 724 F.2d at 1124. Similarly, although it is ordinarily error for a court to omit to instruct the jury as to a substantive element of

1. "A party waives a right when he intentionally relinquishes or abandons it. . . . This is to be distinguished from a situation in which a party fails to make a timely assertion of a right—what courts typically call a 'forfeiture.' " *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir.2002).

the offense even in the absence of a request for an instruction, the failure to request an instruction on venue ordinarily means that the issue is simply bypassed. *See United States v. Haire*, 371 F.3d 833, 839 (D.C.Cir.2004). But perhaps the most striking difference between the venue "element" and the substantive "elements" is that venue may be proved by just a preponderance of the evidence, rather than by proof beyond a reasonable doubt. *See United States v. Salinas*, 373 F.3d 161, 163 (1st Cir.2004). If the standard of proof for the venue "element" may be different from the standard of proof for the substantive elements of the offense, why may not the identity of the fact finder for that "element" be different as well?

It is undeniable that many cases can be found that seem to require the submission of the question of venue to the jury, at least in some circumstances. What is generally lacking is an explanation of *why* submission of the question is *required*, as distinguished from simply being permitted. Instead, the statements indicating that venue must be submitted to the jury seem often the product of reflex or habit, rather than decision. Here is an illustration. In *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir.1980), the Second Circuit stated flatly: "Where the defense[ ] of . . . improper venue [is] squarely interposed, [it] *must be* submitted to a properly instructed jury for adjudication." *Id.* at 1022 (emphasis added). The court cited its prior case of *United States v. Rodriguez*, 465 F.2d 5, 8-9 (2d Cir.1972) as authority for the stated proposition. *Rodriguez* stands as an example of a case where the issue was in fact submitted to the

jury, but it is not authority for the proposition that it *must be* so submitted. The trial court in *Rodriguez* had submitted the question of venue to the jury. The government argued two alternate theories in support of a finding that venue was proper. On appeal, the court concluded that one theory was proper but that the other—that the offense in question was a continuing offense within the meaning of 18 U.S.C. § 3237, making venue proper in more than one district—was unavailable as a matter of law. Because it could not be determined which venue theory had persuaded the jury, the verdict was set aside and the case remanded. Whether or why submission of venue issues to the jury was required was not addressed by the *Rodriguez* court. So far as it appears, it was simply assumed that the question should be decided by the jury. From the fact that it *had been done* in *Rodriguez*, it appears that the *Grammatikos* court jumped to the conclusion that it *had to be done* in general. This seems to be a theme that runs through the cases.

None of this is to say that it is either wrong or inadvisable to submit contested venue questions to the jury, but rather simply to respond to the defendant's argument that it is necessary to do so. Indeed, asking the jury to decide contested venue questions in any given case may be counseled by a prudent regard both for the competence and traditional stature of juries and for the constitutional significance of the right to be tried only in a proper venue. *See United States v. Johnson*, 323 U.S. 273, 275-76, 65 S.Ct. 249, 89 L.Ed. 236 (1944). To say that a particular approach might be prudent,

however, is not to say that it is mandated, and thus the question of whether a judge or a jury should resolve the venue issue remains open, at least in this Circuit.

A practical rule of decision, even if it is not compelled, is suggested by the Third Circuit in *Perez*, and it may be rephrased as follows: the venue question should be submitted to the jury when (1) the defendant has timely objected that venue in the forum chosen by the government is improper, (2) there is a genuine issue of material fact upon which the question of venue necessarily turns, meaning that the venue question cannot legitimately be resolved without first resolving the underlying factual dispute, and (3) the defendant has timely requested that the jury be instructed on the issue and given the task of deciding it. *See Perez*, 280 F.3d at 327. *See also Haire*, 371 F.3d at 840 (adopting the *Perez* test).

Here, the first and third parts of the test (which are closely related) have been met.[2] Resolution of the issue therefore hinges on the second criterion, whether there was, in the evidence, a genuine issue of material fact upon which the venue question turned. I adhere to my conclusion, expressed in summary terms at the conclusion of the evidence, that there was no genuinely disputable factual issue upon which the resolution of the venue issue depended.

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2. Although, as the government has pointed out, the defendant's compliance with the third part was a bit on the casual side, it was sufficient.

For an offense that is a "continuing" one, venue is proper "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). By statutory definition, mail fraud is such a continuing offense and may be prosecuted "in any district from, through, or into which" the mailed matter has moved. *Id.* Although § 3237(a) does not specifically address the offense of wire fraud, it is clear that to the extent the wire communication is sent from one district to or through one or more others, it also should be considered a "continuing" offense, with venue proper in any district in which the offense was "begun, continued, or completed." "Begun" and "completed" are clear enough; the offense is continued if the wire transmission passes through facilities of interstate wire communication on its way from beginning to end. *See United States v. Pace*, 314 F.3d 344, 349 (9th Cir.2002); *United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir.1987).

Each of the mailings that form the basis for the five mail fraud counts (counts 15 through 19) began in Massachusetts. The uncontested proof at trial conformed to the allegations of the indictment as to these counts. There is no question that venue was proper as to these counts.

Similarly, all but two of the wire transmissions alleged to have been the instances of wire fraud were initiated in Massachusetts. (See counts 1-2 and 5-14.) Again, the uncontested proof at trial conformed to the allegations of the indictment. Counts 3 and 4, however, alleged wire transmissions originating in New

Hampshire. For these, the "begun" part of the venue statute is inapposite. However, in the case of count 3, the uncontested evidence at trial was that the transmission—a fax—was "completed" in Massachusetts by its receipt at the offices of Benistar Property Exchange Trust Company in Newton. As to count 4, the evidence was that the wire from the bank in New Hampshire to a Merrill Lynch account at Mellon Bank in Pittsburg cleared through the Federal Reserve Bank in Boston. Although the defendant tried to challenge this evidence by suggestive cross-examination, in the end the evidence stood as uncontroverted.[3]

Thus, venue was proper in this district under § 3237(a) even under the former "key verb" standard. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 279-80, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999) (rejecting "key verb" test as exclusive method of evaluating venue). Under the present test, which requires attention to all of the "conduct elements comprising the crime," *see United States v. Salinas*, 373 F.3d 161, 164 (1st Cir.2004), the conclusion that venue is proper in this District is confirmed. The scheme to defraud that is the subject of the indictment was carried out through the Benistar Property Exchange Trust Company office in Newton, Massachusetts. For all the transactions alleged in the indictment, it was in Newton that the specific documents for each exchange transaction were prepared

3. To the extent there was a genuine issue of fact which, as the trial judge, I am authorized to decide, I am convinced by a preponderance of the evidence that the wire alleged in count 4 passed "through" this district.

for delivery to the exchangors. Communications from the exchangors or their representatives were directed to Martin Paley and other workers in the Newton office. Apart from the distinct mailings or wire transmissions that are the specific conduct alleged to violate the respective statutes, the broader conduct was the promotion and administration of the exchanges centered in the actions of Paley and others in the Newton office.

Carpenter maintains that he did not commit acts within Massachusetts for which he can be held criminally liable. That is a separate matter, which is addressed later in this memorandum. The venue point is this: *if* Carpenter is properly held liable as a participant in the conduct of the scheme, many of the acts done in execution of that scheme occurred within Massachusetts, and venue is proper. This is one of those cases where the jury's guilty verdict necessarily implies a conclusion that venue for the trial of the charges against Carpenter was proper in Massachusetts. *See, e.g., Miller*, 111 F.3d at 751 (failure to instruct on venue when requested does not constitute reversible error where it is beyond a reasonable doubt that the jury's guilty verdict on the charged offense necessarily incorporates a finding of proper venue). If the acts constituting the conduct of the scheme were properly attributed to him, he acted within Massachusetts for venue purposes.

Appendix B

B. *Variance/Constructive Amendment*

Carpenter argues that the government's proof at trial focused on misrepresentation by *omission*, whereas (he says) the indictment charged only affirmative misrepresentations. He contends that the variance of the proof from the indictment amounts to an illegitimate constructive amendment of the indictment. The government insists that the proof at trial was consistent with the allegations of the indictment.

The indictment alleged that Carpenter made written and oral statements that were materially false. *See, e.g.*, Superseding Indictment, ¶ 27. There was no evidence at trial that Carpenter personally made any oral misrepresentations, so the focus was on the written statements that the indictment alleged were materially false. The government's theory, and its argument to the jury, was that certain statements in written materials provided by Benistar to the exchangors were either plainly false or were "half-truths" that required that fuller information or explanation be given to the exchangors if they were not to be considered materially misleading.[4] Put another way, the fraudulent scheme alleged in the indictment included the "omission" to clarify the half-truths that the defendant directed toward the exchangors. This theory is well within the scope of the indictment, and proof of such "omissions" was neither a variance nor a new theory. There was no constructive amendment of the indictment.

4. Carpenter's argument that there can be no written, as opposed to oral, half-truths is unconvincing.

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C. *Sufficiency of the Evidence*

Carpenter argues that the evidence at trial was insufficient to prove him guilty of mail or wire fraud beyond a reasonable doubt. He focuses on two propositions: (1) the government's evidence failed to disprove his good faith; and (2) the government failed to prove that he had "caused" the mailings or wire transmissions that formed the basis for each of the counts in the indictment.

Carpenter's good faith argument misses the mark. The good faith he has in mind (as described in his motion for acquittal) was his belief that there were no restrictions on his ability to invest exchanger's funds in any manner he saw fit. However, this good faith belief on his part was not the relevant one.

The concept of good faith enters the prosecution of mail or wire fraud offenses in relation to the government's burden to prove that the defendant had a specific intent to defraud. *See United States v. Dockray*, 943 F.2d 152, 155 (1st Cir.1991); *New England Enterprises, Inc. v. United States*, 400 F.2d 58, 71 (1st Cir.1968). That is, good faith is essentially the opposite of an intent to defraud. *Dockray*, 943 F.2d at 156. Thus, when a defendant puts his good faith in issue, it becomes part of the government's burden to sustain its proposition that he acted with intent to defraud by negativing any inference that might be permissible on the evidence that the defendant had acted in good faith.

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In this case, the government's theory was that Carpenter knew that the promotional materials and transactional documents used by Benistar contained assurances to exchangors that their funds once turned over to Benistar would be held safely in escrow accounts from which they would not move except to be reinvested in qualifying property or to be returned to the exchangors, and further that Carpenter knew that these assurances were either false or materially incomplete. More particularly, as the government's theory goes, Carpenter knew that the exchangors were not being advised that, contrary to the assurances in the documents, he intended to use their funds to invest in the options market. In other words, the scheme was to obtain the exchangors' money on the basis of assurances known by Carpenter to be fraudulent. The government's theory was supported by evidence at trial that would have permitted the jury to conclude that Carpenter knew what the documents that were used to induce the exchangors to entrust their money to Benistar did and did not say and, more specifically, that he knew that the material information that their funds would be used in options trading was withheld from the exchangors. Upon this evidence, the jury could find beyond a reasonable doubt that Carpenter had a specific intent to defraud, implying a rejection, by the requisite standard of proof, of a claim of good faith.

Whether Carpenter believed in good faith that he was free, under the terms of the transactions with the exchangors, to invest their funds as he saw fit—including by engaging in options trading—is not the point. Such a

good faith belief would not be inconsistent with proof of specific intent to defraud, as discussed above. The object of the scheme to defraud was obtaining control of the exchangors' money by false pretenses; the fraud was not, as the defendant has himself repeatedly emphasized, the pursuit of an incautious investment strategy. The scheme's object was achieved when the money was obtained, before it was invested. Even if, as the defendant believes, there were no positive legal or contractual impediments to his investing the funds as he wished, that belief does not necessarily affect the existence of a prior intent to obtain control of the money by false pretenses.

Carpenter's other argument, that the evidence was insufficient to prove that he "caused" the alleged mailings and wire transmissions, is more substantial. The respective mailings and wire transmissions, it bears emphasizing, were the "gist" of each of the charged offenses. *See United States v. Wood*, 364 F.3d 704, 726 (6th Cir.2004); *United States v. Brooks*, 748 F.2d 1199, 1202 (7th Cir.1984). The jury was instructed as follows:

> To cause an interstate wire transmission is to do an act with the knowledge that a reasonably foreseeable consequence of that act is that an interstate wire communication will be transmitted by someone. Similarly, to cause the mails to be used is to do an act with the knowledge that it is reasonably foreseeable that the use of the mails will follow.

See First Circuit Pattern Criminal Jury Instructions §§ 4.12 and 4.13 (1998).

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According to the evidence, any act done by Carpenter was, relative to other actors, somewhat remote from the actual mailings or transmissions specified in the indictment. All of the wire transmissions and three of the five mailings were most directly "caused" by the exchangors or their agents, sending funds either to Benistar or directly to Merrill Lynch or PaineWebber. Two of the mailings (counts 15 and 19) were directly "caused" by someone at the Benistar Newton office, sending funds to Benistar's Connecticut office.

At the next remove was Paley, who solicited the exchangors and executed the transaction documents. It was certainly foreseeable to him that mail and/or wire transmissions would occur in consummating the transactions. He had to have been aware not just that sometime, somewhere, somebody would use the mails or interstate wire communications facilities; he had to have known who was likely to do so and when. He can plainly be said, under the applicable definition, to have "caused" the mailings or wire transmissions alleged in the indictment.

Carpenter stands farther back, both in time and in proximity, from the critical events that are the gist of the charged offenses. On the evidence, any acts by him that preceded any given mailing or wire transmission (and therefore could have caused the transmission) were confined to setting up of the Benistar Property Exchange Trust business with Paley. However, those acts were far from insignificant. The jury could have found on the

evidence that Carpenter reviewed and approved the promotional materials and transaction documents that contained materially false statements or misleading half-truths. Put another way, the evidence permitted the jury to conclude that Carpenter agreed with Paley to form a company to engage in the business of serving as a qualified intermediary for Section 1031 property exchanges, that Carpenter and Paley jointly produced the documents with allegedly fraudulent content and agreed to their use in soliciting exchangors to entrust their funds to that company, that Carpenter expected and intended Paley to use the documents in the transactions with the exchangors, and that Carpenter reasonably foresaw that the mails or interstate wire communications facilities would be used in the consummation of the transactions.[5]

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5. "Causation" in mail fraud cases has been defined very broadly by the courts. *See Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 98 L.Ed. 435 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or that such use can reasonably be foreseen, . . . then he 'causes' the mails to be used."); *United States v. Pimental*, 380 F.3d 575 (1st Cir.2004) (finding that the defendant had "caused" a mailing where he had misrepresented the nature of his business when applying for worker's compensation coverage and insurance company employee later sent a summary of his meeting with the defendant to the insurance company's headquarters); *United States. v. Bortnovsky*, 879 F.2d 30 (2d Cir.1989) (defendant "caused" mailing where he filed false report with insurance company and that company, two years later, mailed the defendant a letter advising them of the need to promptly file suit in order to preserve rights under policy).

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Though Carpenter may not have acted as directly as Paley did to solicit exchangors or to execute the transaction documents with them, his participation in the creation of Benistar Property Exchange Trust Company was more than just an isolated historical event with no ongoing effect. To the contrary, having joined with Paley initially to devise the fraudulent scheme, Carpenter remained a participant in it. Paley's acts in furtherance of the scheme produced the funds which Carpenter used to conduct his trading.

Some courts have noted some similarity between a scheme to defraud in the context of the mail and wire fraud statutes and a criminal conspiracy. *See, e.g., United States v. Cohen*, 516 F.2d 1358, 1362 (8th Cir.1975); *United States v. Grow*, 394 F.2d 182, 203 (4th Cir.1968). It has been suggested that an "individual participant in a fraud scheme will be held liable for the acts of his agents and co-schemers that are within the general scope of the scheme . . . unless, as in a conspiracy, he undertakes some affirmative act of withdrawal." *Cohen*, 516 F.2d at 1364.

There are good reasons to be skeptical of an approach that would tend to treat mail or wire fraud substantive charges as implicitly charging a conspiracy. First of all, it is entirely unnecessary. If the facts presented to the grand jury warrant it, an indictment for mail or wire fraud can easily include a conspiracy count as well. Moreover, the notion of "implicit" charging has little, if anything, to recommend it, for reasons both of simple clarity and substantial due process. Reflexively

conflating a fraudulent "scheme" with a "conspiracy" is also likely to confuse the substantive law as to either: for example, proof of an agreement is not necessary for proof of a scheme, as it is for proof of a conspiracy.

Nonetheless, there is some value perhaps to the analogy, including the notion of affirmative withdrawal, in considering whether the evidence in this case was sufficient to permit a jury to conclude that Carpenter's "acts" in setting the scheme in motion may be considered still causally effective at later points in time when Paley acted in other ways to further the scheme. By continuing his relationship with Paley in the Benistar Property Exchange Trust Company, Carpenter was effectively ratifying and renewing the initial institution of the scheme they had jointly formed, namely the continued use of the misleading documents to solicit exchangors, whose funds Carpenter used to invest in the options market. A jury finding to that effect was warranted on the evidence, and such a finding would have further justified a conclusion that Carpenter committed the crimes alleged.[6]

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6. It should be emphasized that this analysis is directed toward Carpenter's culpability as a principal, for having himself used the mails and interstate wire communication facilities to execute a scheme to obtain money or property by false or fraudulent pretenses. He was not (although he might have been) charged as a co-conspirator with Paley, and although the indictment contains a reference to 18 U.S.C. § 2, during trial the government disavowed a theory of Carpenter's culpability based on his having aided or abetted Paley. His conviction rests on his own acts, not on Paley's attributed to him.

For all the foregoing reasons, Carpenter's motion for judgment of acquittal is DENIED.

II. *The Motion for a New Trial*

Carpenter asserts several reasons why a new trial should be ordered. Two of his arguments—that venue was improper and that the indictment was constructively amended—have been addressed in connection with his motion for a judgment of acquittal. Essentially for the same reasons, no new trial is warranted.

His other arguments for vacating the verdict and granting him a new trial fall under two general claims. First, he says the government violated its disclosure obligations in certain respects that prejudiced him. Second, he contends that the government's arguments to the jury were improper.

A. *Disclosure*

Carpenter contends that the government failed to disclose information it knew about Martin Paley that had potential exculpatory value. While the background to this argument is the case law emanating from *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), Carpenter's argument is more particularly based in this Court's Local Rules. Local Rule 116.2 (captioned "Disclosure of Exculpatory Evidence") establishes a timetable for the disclosure by the government of potentially exculpatory material. It begins with a definition of exculpatory information:

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

> (1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
>
> (2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;
>
> (3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; or
>
> (4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

L.R. 116.2(A).

Two preliminary observations about this definition are in order. First, the categories of information listed in the Local Rule as potentially exculpatory are

consistent with the applicable case law, covering matters that may be directly exculpatory in that they tend to negative an inference of the defendant's guilt, as well as matters that are indirectly exculpatory in that they impeach or call into question some of the government's inculpatory evidence. Second, it is worth noting the important qualification in the Rule's preamble, as in the case law: to be exculpatory, information must be both "material" and "favorable to the accused."

Assessing the materiality of potentially exculpatory information is guided by the principles outlined by the Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Materiality is not judged simply by asking whether the information might be favorable to the defendant in some degree. Put the other way around, not all information favorable to the defendant is necessarily material. *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555; *Bagley*, 473 U.S. at 675 & n. 7, 105 S.Ct. 3375. The touchstone of materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

The materiality of the undisclosed information is to be assessed not in isolation, but in the context of the entire record at the trial. *See United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Carpenter's argument that the government withheld exculpatory information from him focuses on Local Rule 116.2(B)(2)(e) and (f),[7] which provide:

> (e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.
>
> (f) A written description of any conduct that may be admissible under Fed.R.Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

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7. Carpenter also makes two more general and perfunctory arguments, based on Local Rule 116.2(B)(2)(a) and (B)(2)(c), that the government was required to provide "information that tends to cast doubt on the credibility of [Paley]" and, similarly, that it was required to provide "[a]ny inconsistent statement . . . made orally or in writing by [Paley]." As explained in greater depth in the discussion of the government's obligations under Local Rule 116.2(B)(2)(e) and (f), *see* text pp. 18-23, the government did provide Carpenter with all material information it was required to produce under Rule 116.2. The government's failure to disclose its own subjective evaluations of that information does not constitute a violation of the Local Rules.

Relying on these provisions, he asserts the government improperly failed to disclose to him its belief that Paley had lied to government investigators when he told them in interview sessions that he had not known until December 2000 that Carpenter was investing exchangors' funds in the options market. Paley had been telling the government all along that he himself had no part in or knowledge of the risky investment strategy being pursued by Carpenter, the intended inference being that he had not intentionally misled the exchangors by withholding that information, because he himself had been duped by Carpenter. At trial, the government pointedly refrained from asking Paley whether he knew how the funds were being invested by Carpenter, because the government believed his answer might be false.[8]

The government had provided the defense with FBI 302 reports summarizing what Paley had told government agents, as well as copies of documents that Paley had furnished to the government from his own or Benistar's files. In other words, the government disclosed what Paley had said to them. What was not disclosed, but which Carpenter asserts should have been, was the government's belief that Paley was not being truthful in his statements to agents and to the prosecutors. Carpenter reasons that if the prosecutors believed Paley was lying to them and the agents, then

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8. Paley was extensively cross-examined by the defense about his knowledge of the options trading, and he gave inconsistent testimony. At different points, he both admitted and denied that he knew as early as September 1998 how the funds would be invested by Carpenter. *See* Appendix A.

they must also have realized that Paley was prosecutable under 18 U.S.C. § 1001 (punishing materially false statements), and this should have been disclosed under Local Rule 116.2(B)(2)(e). In addition, such instances of deceptive conduct might be admissible under Fed.R.Evid. 608(b) in the course of Carpenter's cross-examination of Paley, requiring disclosure under Local Rule 116.2(B)(2)(f). Moreover, Carpenter adds, if Paley's denials that he knew how Carpenter was investing the funds were false, then under the government's theory of this case, he also would have been culpable (and therefore prosecutable) in the scheme to defraud, and that should have been disclosed pursuant to Local Rules 116.2(B)(2)(e) and (f) as well.[9]

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9. Carpenter also argues that Paley's alleged culpability for these crimes makes it "simply implausible" that no agreement or understanding was reached with the government to protect him from prosecution, and that the government's assertions to the contrary "def[y] logic, experience and common sense." Def.'s Reply to Government's Opp'n to Mot. to Set Aside the Verdict and Grant a New Trial, at 17-18. In his Rule 33 motion, he implies that such an agreement must exist and argues that the government must therefore have run afoul of Local Rule 116.2(B)(2)(c), which requires production of a "statement whether any promise, reward or inducement has been given to any witness whom the government anticipates calling in its case in chief." The only support Carpenter offers for this contention (in addition to his generalized suspicions) is that Paley's counsel met with the government in July of 2001, after which Paley sent him a fax congratulating him on a job well done and asking how much of his time would be taken up, presumably by issues related to Paley's testimony.

At trial, however, Paley explicitly denied that there was any such agreement. Trial Transcript, Day 9, page 57, lines 3-10

(Cont'd)

Carpenter's argument is unpersuasive. The government had disclosed the factual information it had about what Paley told government agents. Paley's statements as recorded in the 302s and his own personal notes and records were available to be used, and in fact were used, in cross-examination by the defense to attack his credibility. The defense position at trial was that Paley's statements, whether in trial testimony or in interviews with government agents, were not to be believed. The information provided by the government in pretrial discovery was utilized to attack his credibility, precisely the purpose intended to be facilitated by the discovery rules.

Carpenter's position amounts to an argument that the government must not only disclose exculpatory *evidence* or *information* in its possession about one of its witnesses, but also provide an *opinion* about the reliability of that information. After the government says to the defendant, "Here are all the statements made to

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(Cont'd)

(Q: "Mr. Paley . . . do you have any agreement whatsoever with the U.S. Attorney's Office?" A: "No, I do not." Q: "No immunity agreement?" A: "No." Q: "No promise you wouldn't be prosecuted?" A: "No agreement."). In its opposition to the Rule 33 motion, the government reiterated this position. Government's Opp'n, at 5 ("The government gave no promises, rewards or inducements to Paley. No assurances were made, no promises given, and no agreements entered.").

I have seen no evidence that leads me to believe that the government violated Local Rule 116.2(B)(2)(c), or that a further hearing on this issue is warranted.

us by the witness," Carpenter's claim is that it is then required to add the gloss, "But we don't believe him."

The government's evaluation of its own evidence would not be admissible or otherwise useable by the defense at trial. While the parties may argue that a particular witness should be believed or disbelieved, the witness's credibility is ultimately a matter for the jury to decide. The parties' own judgments are not relevant or even proper.[10] The discovery rules are designed to give a defendant the tools with which to discredit a government witness by disclosing the objective facts about what the witness has said or done in the past. The rules do not require the government to disclose subjective evaluations of the witness's statements or deeds.

Apart from being outside the scope of what might be defined as exculpatory evidence, such evaluative opinions are also not "material" in the necessary sense. Not being admissible or useable at trial, they cannot lead to a reasonable probability that the outcome of the trial would have been altered by their disclosure, which is necessary to a finding of materiality.

The defendant here argues that he could have used the information in a different way. Assuming that the

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10. Plainly the government cannot vouch that a witness's testimony is credible. *See United States v. Torres-Galindo*, 206 F.3d 136, 142 (1st Cir.2000). The defendant proposes a kind of "vouching for incredibility"—that the government should be *required* to say when it does not believe one of its witnesses.

government's view of Paley's credibility could not be made known to the jury, Carpenter argues that if he had known that the government thought Paley was lying when he said he lacked guilty knowledge of Carpenter's investment strategy, he would have formed a different trial strategy. In substance, rather than contending that Paley was a liar who had duped the government just as he had duped everyone else, he would have argued that everyone, including the government, agreed that Paley was a liar. He would have added that the government, notwithstanding its view that Paley was guilty, chose not to prosecute him but rather picked on the person Paley was attempting to frame, a fact that should lead the jurors to reject the attempt by finding Carpenter not guilty.

Two answers can be made to this argument. First, to accept it would be to expand the government's discovery obligations well beyond the bounds that have been set, either by precedent or by the Local Rules. What Carpenter proposes is not irrational. An "open file" regime of discovery could be imposed on the government in a criminal case, and could include a requirement that the government disclose not only hard information but also its evaluations, assessments, and even trial strategies. It is sufficient to say that such is not the state of the law concerning criminal discovery, which attempts to accommodate the defendant's right to a fair trial within the context of the traditional adversary process. *See Bagley*, 473 U.S. at 675, 105 S.Ct. 3375. If there is to be an expansion of the government's obligations to include disclosure of subjective assessments of evidence, it will have to come from those who wield the precedential gavel.

Second, this argument also fails the materiality test. If Carpenter had known what the government thought about Paley's truthfulness, he would have made his argument that Paley was a liar in a different way. He still made a forceful argument that Paley was a liar, backed up by a cross-examination of Paley that exposed the witness's many inconsistencies and prevarications. He may even have succeeded in convincing the jury of that fact. It is conceivable on the evidence that the jury could have thought that Paley was a liar but still have concluded that Carpenter was guilty. That seems to have been the government's view up to a point, and there is nothing inherently contradictory about it. Under these circumstances, Carpenter has not shown that the undisclosed information about the government's view of Paley's credibility—and thus his potential "prosecutability"—was material in the necessary sense. There is not a reasonable probability that Carpenter was denied a fair trial because the government did not identify Paley as a potential defendant in a false statements prosecution.

Carpenter also renews an argument made and rejected at trial. As noted above, Paley consistently told the government that he did not know until December 2000 how Carpenter was investing exchangor funds. Apparently, the government did not believe that was true; the statement appeared to be contradicted, or at least seriously qualified, by some of the documents Paley had produced. Consequently, in Paley's direct examination, the prosecutor deliberately avoided asking Paley when he learned that Carpenter was investing the funds in the options market

because such a question might have elicited what the government regarded as false testimony. Paley was asked on cross-examination when he first knew about Carpenter's investment use of exchangors' funds, however, and his answers could easily have been understood as contradicting what the FBI 302s reported he had said to the government.[11]

Carpenter pointed out that the FBI 302s showed that Paley had *not* told the government that he knew prior to December 2000 how Carpenter was investing the exchangors' funds. Consequently, Carpenter argued, the government had to realize that Paley's testimony on cross-examination, that he *had* told investigators that he knew of Carpenter's investing prior to December 2000, amounted to perjury. That realization, Carpenter asserts, imposed on the government the obligation to correct the perjury by stating in open court that it disbelieved Paley in this respect. Carpenter's argument was based principally on *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).[12]

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11. The confusing and contradictory nature of Paley's testimony on cross-examination is evident from the Trial Transcript, excerpts of which are attached hereto as Appendix A.

12. In *Napue*, the prosecution asked a witness whether he had been promised leniency in exchange for his testimony. The witness replied that he had not. The prosecutor knew that this answer was false but did not correct it. The Supreme Court held that the prosecutor had an obligation not to let the false answer stand without correction.

I reject the argument now for the same reasons I did so at trial. There are two important differences between *Napue* and this case. First, in *Napue*, the prosecutor's own question elicited the false testimony, making the prosecutor effectively the sponsor of the falsity unless he took steps to repudiate it. Here, the false testimony[13] by Paley that Carpenter points to was not elicited by the prosecutor, and the prosecutor therefore is not implicitly the sponsor of the specific answers said to be false. It is not an uncommon thing for criminal prosecutions to depend on testimony from persons who are less than fully honest truth-tellers. It is one thing to hold the prosecution to an obligation to correct testimony it knows to be false when elicited as part of its own examination of its own witness, as in *Napue*. It is quite another to require the government to follow any cross-examination of its witness with a disquisition for the benefit of the jury evaluating how truthful (in the government's opinion) the witness was in answering defense counsel's questions.

Second, and more significantly, in *Napue* the falsity of the witness's answer was known only to the prosecutor. No other method of correction was available than to require the prosecutor to do it. In this case, the defense was well aware of the inconsistencies between what the FBI 302s recorded that Paley had said in the interviews and what Paley's contrary testimony was. Defense counsel was prepared to expose the inconsistencies to

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13. For purposes of evaluating Carpenter's argument, I assume that the testimony was false.

the jury and did so with some emphasis. Counsel was permitted to review the agents' raw notes from which the 302s were prepared and was further permitted to call the agents as witnesses to contradict Paley's testimony. The jury was given the tools to judge how false the testimony was and to decide what effect that might have on its evaluation of the issues presented.

There was no ethical breach by the government, and there was no need for any further remedy in light of the ample opportunity given to demonstrate Paley's putative perjury through the evidence.

B. *Prejudicial Inflammatory Argument*

In the government's closing argument, both in the chief argument and in the rebuttal, the prosecutors seized upon a remark attributed to Carpenter by a witness to build an extended metaphor likening his investments of exchangor funds in the options market to "gambling." This included not only repeated uses of some form of the verb "gamble," but also other gambling references, such as betting, cashing in chips, and doubling down.[14] On more than one occasion, the prosecutors referred to Carpenter's "gambling with

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14. Carpenter's reply brief cites fourteen occasions in the government's closings where gambling references were pointedly made. *See* Def.'s Reply to Government's Opp'n to Mot. to Set Aside the Verdict and Grant a New Trial, at 49-50. According to the e-transcript concordance available to me, the word "gamble" was used eight times, "gambled" once, "gambler" twice, and "gambling" seven times.

other peoples' money" to make money for himself—at one point it was said that he was gambling the exchangors' money so that he could "make a million for himself." Trial Transcript, Day Twelve, at page 95, line 19.

Carpenter objects that these repeated references to gambling were intended to, and did, inflame the jury's passions against the defendant, and consequently he urges that the verdict from the thus—incited jury must be set aside.[15] I agree.

The gambling characterizations were not, as a matter of the narrative of the government's case, wholly inapt. Carpenter's persistence in an investment strategy that was high-risk to begin with and was proving through most of 2000 to be dramatically unsuccessful could very plausibly be characterized as gambling. But the aptness of the metaphor to the behavior is not the only consideration. *See United States v. Felton*, 417 F.3d 97, 103 (1st Cir.2005) ("Technical accuracy is perhaps not conclusive. One can imagine situations in which an epithet carries connotations well beyond the crime charged (*e.g.*, 'murderer' in a case of negligent homicide),

15. He also advances other grounds for his argument that prosecutorial misconduct requires a new trial, such as violation of the "golden rule" that the jurors should not be asked to put themselves in the position of the exchangors. In light of the disposition of the "gambling" issue, it is unnecessary to address these other grounds in detail. It is enough to say that I would not find those other grounds, either separately or in the aggregate, to require a new trial.

or cases in which the description is gratuitously inflammatory, serving no reasonable purpose in summarizing the government's position."). The real problem is that the references, in addition to being persistently pejorative, had the tendency to lead the jury away from the charges in the indictment by inviting them to blame Carpenter because he was a gambler, or because he lost the exchangors' money, rather than because he had committed mail or wire fraud.

According to the indictment, the scheme to defraud that Carpenter used the wires and mails to execute entailed making false representations or half-truths to induce the exchangors to entrust their property, that is, the proceeds of the sale of real estate, to Benistar Property Exchange Trust Company. The deception succeeded when an exchangor gave the funds to Benistar. The specific mailings and wire transmissions alleged in each of the counts in the indictment all involved the sending to Benistar (or directly to an investment firm) of either transaction documents or the funds themselves. In each case, the crime was completed when the mailing or wire transmission occurred, before Carpenter had invested, or "gambled," any of the money. The "gambling" of the money was not part of the offense.

Evidence of Carpenter's investment activity was admitted not because that activity was the focus of the criminal charges—it was not—but because evidence that by mid-2000 Carpenter was experiencing heavy losses in the options trading was relevant to the question of whether he acted with the specific intent to defraud

necessary to support a conviction. The government's theory was that his knowledge of the losses he was sustaining in the trading tended to prove that he knew that representations he thereafter made to the exchangors that their money would be kept safe, would not be moved from an escrow account, etc., were false. In other words, even assuming, *arguendo*, he did not believe such representations to be false or misleading during the time when he was making profits on the investment of the funds and so was able to return to the exchangors all the money they had entrusted to Benistar, the jury could conclude that the misleading tendency of the representations had to have been known to him—and by inference had to have been intended by him—after he became aware of the magnitude of the losses he was suffering.

This was a rather limited purpose. Nonetheless, considerable evidence about the trading losses was introduced by the government. The figures and charts demonstrating the extent and persistence of the trading losses were dramatic. Moreover, this evidence was introduced in the latter stages of the government's case, close in time to the closing arguments. As the arguments were made, this evidence likely remained vivid in the jurors' memories.

Condemning Carpenter for "gambling," as the prosecutors persisted in doing, was an appeal to instincts of moral disapprobation about recklessness, waste, and perhaps even theft. The prosecutors' inflammatory argument repeatedly emphasizing the "gambling"

metaphor, coming as it did after the dramatic evidence of losses, may have diverted the jury from its consideration of the crimes charged and may thus have induced a verdict based on the jury's disapproval of the "gambling," rather than because the jury was satisfied beyond a reasonable doubt that the elements of the offenses charged had been proven.

A key consideration in evaluating a motion for a new trial because of inflammatory argument is the overall strength of the government's case. *See United States v. Manning*, 23 F.3d 570, 574 (1st Cir.1994); *United States v. Mandelbaum*, 803 F.2d 42, 45 (1st Cir.1986). Here, though sufficient to withstand a motion for judgment of acquittal, the case was not so strong that it can confidently be said that the repeated "gambling" references had no illegitimate effect on the jury's assessment of the evidence. On what was perhaps the crucial issue, the jury would certainly have been warranted in concluding beyond a reasonable doubt that Carpenter acted with intent to defraud, but a contrary conclusion also would have been rationally possible on the evidence.

Because it cannot be said with confidence that the government's improper closing arguments did not taint the verdict, the verdict cannot be allowed to stand. Accordingly, the motion for a new trial is granted, and the verdict of conviction is set aside.

III. *Conclusion*

For the foregoing reasons, the defendant's motion for judgment of acquittal (dkt. no. 160) is DENIED. His motion to set aside the verdict and for a new trial (dkt. no. 158) is GRANTED.

It is SO ORDERED.

December 15, 2005
DATE

/s/ George A. O'Toole, Jr.
DISTRICT JUDGE

Appendix A

Here is some of Paley's testimony regarding his knowledge of Mr. Carpenter's investment strategy, as given on cross-examination by defense counsel:

> Q. So as of September of 1998, you understood, Mr. Paley, there could be losses in the funds holding the clients', the exchangors' funds, correct?
>
> A. That's true.

Trial Transcript, Day Eight, page 39, lines 20-23.

> Q. Did you tell [the prosecutor] when you sat down across the table from him trying to convince him not to seek an indictment of you, Mr. Paley, that you knew from day one, September 1998, your clients' funds could potentially be lost to investment?
>
> A. No.
>
> Q. You didn't tell him that, did you, sir?
>
> A. No.
>
> Q. You knew if you told [the prosecutor] that, you knew if you acknowledged that you knew your clients' funds could be lost due to

investments, that wasn't going to prevent you, Mr. Paley, from being blamed, right?

A. That's true.

Id., at page 40, lines 7-18.

Q. You've testified on direct examination three or four times that you told [the prosecutor] that you didn't know your clients' funds were at risk of loss. You've said that three or four times?

A. I did not know that they were at risk of being lost.

Id., at page 41, lines 6-10.

Q. Mr. Paley, did you sit down with [the prosecutor] trying to convince him not to seek an indictment against you, and you told him that you didn't know until the end of December 2000 that your clients' funds were at risk?

A. That's true.

Id., at page 42, lines 13-17.

Q. Well, how could you have told [the prosecutor] on three occasions that you never knew your clients' principal was at risk when you've testified here in court that as of day

one, September of '98, you did know that your clients' principal was at risk?

A. The reason is because that (sic) I had not held signatory on accounts or managed the money.

Q. I didn't ask what your responsibilities were. I asked you what your knowledge was.

A. There were monies that were invested. Clients' monies were invested, yes.

Q. Mr. Paley, my question is when you were asked questions about this specific document by [the prosecutor], did you tell him that you knew, as you've testified today, as of September 9th, 1998, that your clients' funds could be lost to investment? Did you tell [the prosecutor] that when he asked you that question?

A. I did.

Q. You told [the prosecutor] that you knew that your clients' funds could be lost to investment?

A. That's a possibility, yes.

Id., at page 44, lines 5-24.

Q. You told [the prosecutor] when you sat down with him you were unaware that Mr. Carpenter had been trading the corpus, the principal, in the stock market until the end of 2000, correct?

A. That's true.

Q. That's not true, though, is it, sir?

A. That's true.

Q. You did know prior to December 2000 that Mr. Carpenter was investing your clients' funds in the stock market, didn't you?

A. He was investing clients' money in investment vehicles, yes.

Q. The stock market, sir?

A. Yes.

Q. And you knew that he was investing the clients' principal in the stock market?

A. Yes.

Id., at page 59, lines 6-24.

Q. . . . But, you sat down with [the prosecutor] and told him that you didn't know that, sir, until the end of 2000.

A. No, sir.

Q. You didn't tell [the prosecutor] that?

A. No, sir.

Q. So when you sat down with [the prosecutor] in December of 2001, in February of 2002, in January of 2004, you told [the prosecutor] that you knew your clients' funds, the principal, was being invested in the stock market before December 2000?

A. Yes.

Id., at page 61, lines 1-10.

APPENDIX C — AWARD, NASD DISPUTE RESOLUTION DATED DECEMBER 15, 2005

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Benistar Employer Services Trust Corporation and Benistar Property Exchange Trust Company, Inc. (Claimants) v. UBS PaineWebber Inc. n/k/a UBS Financial Services Inc. (Respondent)

Case Number: 03-08742

Hearing Site: New York, New York

Nature of the Dispute: Customers v. Member

REPRESENTATION OF PARTIES

Claimant Benistar Employer Services Trust Corporation ("BESTCO"): Richard S. Order, Esq., Axinn, Veltrop & Harkrider, LLP, Hartford, CT and Jack Robinson, Esq., Benistar, Stamford, CT.

Claimant Benistar Property Exchange Trust Company ("BPETCO"): Anthony R. Zelle, Esq., Denner O'Malley, LLP, Boston, MA. Previously represented by Richard S. Order, Esq., Axinn, Veltrop & Harkrider, LLP, Hartford, CT and Jack Robinson, Esq., Benistar, Stamford, CT.

Appendix C

Respondent UBS Financial Services, Inc., hereinafter collectively referred to as "Respondent": R. Todd Cronan, Esq., Goodwin Procter, LLP, Boston, MA.

CASE INFORMATION

Statement of Claim filed on or about: December 10, 2003.
Claimant BESTCO signed the Uniform Submission Agreement: December 9, 2003.
Claimant BPETCO signed the Uniform Submission Agreement: December 9, 2003.

Respondent's Answer to the Statement of Claim filed on or about: February 3, 2004.
Respondent signed the Uniform Submission Agreement: February 24, 2004.

CASE SUMMARY

Claimants BESTCO and BPETCO asserted the following causes of action: indemnification; contribution; breach of contract; conversion; fraudulent misrepresentation; breach of fiduciary duty; negligence and violations of New York and Connecticut Unfair Trade Practices Statutes. The causes of action relate to stock options of various technology stocks.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Appendix C

RELIEF REQUESTED

Claimants BESTCO and BPETCO requested compensatory damages in the amount of $29,456,064.00; punitive damages in the amount of $58,912,128.00; pre- and post-award interest; forum fees in the amount of $1,800.00; attorneys' fees in the amount of $250,000.00; witness and production fees in the amount of $7,500.00; and other case-related costs in the amount of $5,000.00.

Respondent requested the dismissal of all claims against it, and entry of judgment in its favor, together with all reasonable attorneys' fees and NASD filing and forum costs arising from its defense to the Statement of Claim.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant BPETCO compensatory damages in the amount of $8,705,195.91.

2. Respondent is liable for and shall pay to Claimant BPETCO interest in the amount of $3,825,039.23.

3. Respondent is liable for and shall pay to Claimant BPETCO attorneys' fees in the amount of $125,000.00 pursuant to the Federal Arbitration Act.

4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees
NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= $ 600.00

Member Fees
Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, UBS Financial Services, Inc. is a party.

Member surcharge	= $ 3,750.00
Pre-hearing process fee	= $ 750.00
Hearing process fee	= $ 5,500.00
Total Member Fees	= $10,000.00

Appendix C

Adjournment Fees
Adjournments granted during these proceedings for which fees were assessed:

November 15-19, 2004, adjournment by
Claimant BESTCO = $ 1,200.00

Forum Fees and Assessments
The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator
@ $450.00 = $ 450.00

Pre-hearing conference: July 14, 2004 1 session

Four (4) Pre-hearing sessions with Panel
@ $1,200.00 per session = $ 4,800.00

Pre-hearing conferences:	May 4, 2004	1 session
	July 1, 2004	1 session
	October 1, 2004	1 session
	August 30, 2005	1 session

Fifteen (15) Hearing sessions
@ $1,200.00 = $18,000.00

Appendix C

Hearing Dates:	September 19, 2005	2 sessions
	September 20, 2005	2 sessions
	September 21, 2005	2 sessions
	September 22, 2005	2 sessions
	September 23, 2005	1 session
	November 14, 2005	2 sessions
	November 15, 2005	2 sessions
	November 16, 2005	2 sessions
Total Forum Fees		= $ 23,250.00

1. The Panel has assessed $7,750.00 of the forum fees to Claimant BESTCO.

2. The Panel has assessed $15,500.00 of the forum fees to Respondent.

Fee Summary

1. Claimant BESTCO is solely liable for:

Adjournment Fee	= $	1,200.00
Forum Fees	= $	7,750.00
Total Fees	= $	8,950.00
Less payments	= $	2,400.00
Balance Due NASD Dispute Resolution	= $	6,550.00

2. Claimants BESTCO and BPETCO are jointly and severally liable for:

Initial Filing Fee	= $	600.00
Total Fees	= $	600.00
Less payments	= $	600.00
Balance Due NASD Dispute Resolution	= $	0.00

3. Respondent is solely liable for:

Member Fees	= $10,000.00
Forum Fees	= $15,500.00
Total Fees	= $25,500.00
Less payments	= $10,000.00
Balance Due NASD Dispute Resolution	= $15,500.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Alexander Forti - Public Arbitrator, Presiding Chairperson
Paul T. Green - Public Arbitrator
Farrell C. Glasser - Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

s/ Paul T. Green
Paul T. Green — 12/15/05
Public Arbitrator — Signature Date

December 15, 2005
Date of Service (for NASD Dispute Resolution use only)

APPENDIX D — BENISTAR PROPERTY EXCHANGE FUNDS FLOW DIAGRAM

[FOLD-OUT PAGE ATTACHED]

Benistar Property Exchange
Funds Flow Diagram (Net)
01/ 2000 through 01/2001

Customer Deposits

Customer Payments

Benistar Property Exchange
Merrill Lynch
Account 849- 07B01
01/01/00 thru12/31/00

$4,570,000

Benistar Property Exchange
Merrill Lynch
Account 849-07B10
01/01/00 thru12/31/00

Capital Losses:
$4,000,284

$2,271,833

$870,690

Customer Deposits

Customer Payments

Benistar Property Exchange
PaineWebber
AccountEX 15434 MR
10/01/00 thru01/31/01

$200,000

$4,280,187

$2,000,000

Benistar Property Exchange
PaineWebber
Account EX 15433 MR
10/01/00 thru01/31/01

Change in Value:
$7,212,443
(Loss)

Benistar Employer Services

BEST AVAILABLE COPY

GOVERNMENT EXHIBIT
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